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Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 281, 349

JAMES E. SWANN, ET AL., PETITIONERS, CROSS-RESPONDENTS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., RESPONDENTS, CROSS-PETITIONERS

No. 436

BIRDIE MAE DAVIS, ET AL., PETITIONERS

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

1. *Charlotte-Mecklenburg.* This case was commenced in January 1965, and the district court thereafter approved a free-transfer desegregation plan. 243 F. Supp. 667 (W.D.N.C.), affirmed, 369 F. 2d 29 (C.A. 4). The present proceedings were initiated

in September 1968 by the plaintiffs' motion for supplemental relief based on *Green* v. *County School Board,* 391 U.S. 430, and its companion cases. Following an evidentiary hearing, the district court held on April 23, 1969, that the school system was not being operated in conformity with constitutional requirements and directed submission of a plan for faculty desegregation to be effective in the fall of 1969 and for student desegregation to be implemented in two steps at the commencement of the 1969 and 1970 school years (App. 285a). The school board, in substance, declined to submit a plan for either faculty or student desegregation (App. 330a–340a).

Further evidentiary hearings were held, and on June 20, 1969, the district court again directed submission of a plan (App. 448a). The school board thereafter proposed a plan by which some all-black schools would be closed and students from those schools, as well as from over-crowded black schools, would be permitted to attend predominantly white schools, and otherwise the free-transfer plan would remain in effect; no faculty desegregation plan was offered (App. 480a). The district court approved the board's submission on an interim basis and directed the preparation by November 17, 1969, of a plan for student and faculty desegregation to be effective for the 1970–1971 school year. The school board, indicating that a plan was being prepared, moved for an extension of time until February 1970. The district court denied the motion (App. 655a), and the board again indicated that a plan for student

desegregation was being prepared based on the premises that only rezoning would be used to achieve desegregation and that no school to which white students were assigned would be less than 60 percent white (App. 670a–671a).

On December 1, 1969, the District court held that the board's submission was unacceptable and appointed an education expert to prepare a desegregation plan (App. 698a). Plans were filed by the school board (App. 726a) and the court-appointed expert. On February 5, 1970, the court adopted, with some modifications, the board's plan for secondary schools and the expert's plan for elementary schools (App. 819a) and adopted a timetable for implementation suggested by the board.

Implementation of the plan was partially stayed by the Court of Appeals for the Fourth Circuit on March 5; and thereafter stayed in its entirety by the district court (App. 1255a). This Court declined to disturb the Fourth Circuit's order. 397 U.S. 978. On appeal, the court of appeals indicated approval of the district court's order of February 5 insofar as it rejected the school board's plan but vacated the order and remanded the case for reconsideration and to permit the board to submit a new elementary school plan (App. 1262a). This Court granted certiorari on June 29, 1970, directing reinstatement of the district court's order pending further proceedings in that court (App. 1320a; 399 U.S. 926).

On remand, two new plans for elementary schools were submitted: a plan prepared by the United States

Department of Health, Education, and Welfare based on contiguous grouping and zoning of schools, and a plan prepared by four members of the nine-member school board achieving substantially the same results as the court-expert plan but requiring somewhat less transportation. A majority of the school board declined to amend its proposal. After a lengthy evidentiary hearing, the district court directed the board to adopt the minority board plan or to submit a new, equally effective plan; the court ordered that the court-expert plan would remain in effect in the event that the school board declined to adopt a new plan. On August 7 the board so declined.

2. *Mobile County.* This case was initiated by private plaintiffs in 1963, and the United States intervened as a party-plaintiff in 1967. The history of the litigation is recorded in a lengthy series of decisions cited on page two of the Memorandum for the United States on the petition for a writ of certiorari.

In June 1969 the Court of Appeals for the Fifth Circuit reversed the district court's approval of a desegregation plan combining elements of freedom of choice, geographic zoning, and minority-to-majority transfers. 414 F. 2d 609. The district court was directed to order the school board to engage the assistance of the United States Department of Health, Education, and Welfare in preparing a new desegregation plan for the entire system. HEW developed a two-step desegregation plan, reaching all rural schools and the schools in the western portion of metropolitan Mobile in 1969 and reaching the eastern urban schools

n 1970. The district court adopted a plan substantially the same as the first step of the HEW plan and directed submission of revised plans for the eastern schools. That decision was affirmed *sub nom. Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (C.A. 5) (en banc) (per curiam), reversed in part *sub nom. Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (per curiam).

On December 1, 1969, plans were filed by the school board and HEW. At the district court's request, the Department of Justice filed on January 27, 1970, a separate proposal for implementation pendente lite. On January 31 the district court adopted, with some modification, the school board's submission based on geographic zoning. The plaintiffs and the United States appealed.

On June 8, 1970, the court of appeals reversed, adopting with some modifications the plan submitted by the Department of Justice, and the plaintiffs petitioned for a writ of certiorari. The court of appeals has since twice amended its mandate (see decision reprinted in appendix to the government's memorandum on the petition and *Davis* v. *Board of School Commissioners of Mobile County,* No. 29,332 (C.A. 5, Aug. 28, 1970)).

ARGUMENT

INTRODUCTION AND SUMMARY

Several threshold considerations may serve to illuminate the issues in these two school desegregation cases.

First, these are school districts which contain large metropolitan areas. While this Court has dealt with such districts in the past, it has not had occasion since the *Green* trilogy [1] and *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, to define with particularity the obligations of large metropolitan school systems with respect to pupil assignment. *Green* and *Alexander* answered many of the questions as to the obligations of rural and small town systems, and the question now is the extent to which the remedial principles developed in those cases of classic dualism apply to large metropolitan systems. In this sense, these are cases of first impression.

Second, both of these school systems are characterized by residential patterns of racial separation as well as a history of racial separation in the public schools. The two types of separation are interrelated, but the extent of the relationship is at best speculative. These cases might thus involve the questions whether school boards can retain a "neighborhood school" assignment policy where the result is to operate some schools that are racially identifiable at least to the extent reflected by the racial composition of the student bodies, whether the Fourteenth Amendment requires school boards to achieve some mathematical degree of integration regardless of housing patterns, and the extent to which the burdens of alleviating racial isolation are to be borne by school boards and

[1] *Green* v. *County School Board*, 391 U.S. 430; *Raney* v. *Board of Education*, 391 U.S. 443; *Monroe* v. *Board of Commissioners*, 391 U.S. 450.

school children rather than being shared by other governmental institutions and agencies having the power to affect such isolation.

Third, there is evidence that these school boards previously maintained aspects of dualism—such as some dual, overlapping zones, faculty segregation, and dual transportation systems. If these school districts are, therefore, properly regarded as traditionally dual school systems, whose obligation is to convert to unitary systems, the question remains: what constitutes a unitary system? Stating this question another way: what remedial adjustments would bring these school districts into compliance with constitutional requirements? And, when school boards have failed to select a method of compliance, a further question arises as to the scope of judicial discretion in ordering appropriate remedial adjustments.

These questions relate both to rights and to remedies and raise yet another question: In desegregating school systems is there a conflict between individual rights and public need, and, if so, is there some proper balance between them? We think there could be such a conflict if the Fourteenth Amendment granted students an absolute right to attend school with children of other races, *i.e.*, required some form of racial balance, or if there were an unyielding public need which would justify the wholesale maintenance of racial segregation; but we think the first of these conflicting goals is not prescribed, and the second not countenanced, by the Constitution. Rather, we think the right of school children articulated in *Brown* is to

attend school in a system where the school board exercises its decision-making powers so as to operate a nonracial unitary school system free from discrimination, and that where this has not been done there is a violation of the rights of such children requiring remedial adjustments which give proper weight to that which is feasible and that which is just. If choices exist which may have a racial impact, they cannot be exercised in a racially neutral manner where to do so is to perpetuate segregation. Thus, the right and the remedy are interrelated.

This interrelationship is most easily perceived in rural systems, such as New Kent County, Virginia, where the violation was the maintenance of two twelve-grade schools, one nearly all white and one black, each serving the entire system. Pairing or zoning the two schools were remedies that flowed naturally from this violation. But where scores of schools serve the same grades, some attended largely by students of one race, the remedy is not self-evident.

The controversy in these cases is over the standards to be applied in fashioning remedies for state-imposed segregation in large metropolitan areas. We believe that an appropriate standard should give proper attention to a number of circumstances, such as the size of the school district, the number of schools, the relative distances between schools, the ease or hardships for the school children involved, the educational soundness of the assignment plan, and the resources of the school district.

All these circumstances have been taken into account by HEW's Office of Education in the development of desegregation plans for urban school systems. That Office has followed the general principle that school districts which are under a duty to reorganize have an obligation to make all reorganizational decisions so as to eliminate the vestiges of dualism, but are free at the same time to take into account the benefits to be derived from preserving the traditional neighborhood method of school assignment. In applying this principle, the Office has employed the techniques of expanding contiguous geographic zones and pairing or clustering schools having contiguous zones. This principle has found general acceptance in the lower courts and should be adopted by this Court.

This Court observed in *Green* v. *County School Board*, 391 U.S. 430, that "*Brown II* was a call for the dismantling of well-entrenched dual [school] systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution," *id.* at 437, and held that "[s]chool boards * * * then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437–438; see *Raney* v. *Board of Education*, 391 U.S. 443, 447–448; *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 458–460. Last Term this Court held that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only

unitary schools." *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, 20; see *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290; *Northcross* v. *Board of Education,* 397 U.S. 232.

These decisions clearly contemplated the reorganization of racially segregated, dual school systems. But, like earlier school desegregation decisions of this Court, they arose in the context of rural, classically dual systems or the perpetuation of the most egregious forms of racially dual operation. New Kent County operated two schools, one attended solely by Negroes and the other almost exclusively by whites, offering exactly the same grades and serving exactly the same attendance area (coextensive with the entire county), while both whites and blacks resided throughout the district. Similarly, in *Raney* "[t]here [were] no attendance zones, each school complex providing any necessary bus transportation for its respective pupils." 391 U.S. at 445. In *Monroe* v. *Board of Commissioners, supra,* involving a small city school district in which many residential areas were racially segregated, a zoning plan had "assigned students to * * * schools in a way that was capable of producing meaningful desegregation," 391 U.S. at 458, but a free-transfer option superimposed on geographic zoning had "permitted the 'considerable number' of white or Negro students * * * to return, at the implicit invitation of the Board, to the comfortable security of the old, established discriminatory pattern." *Id.* at 458–459.

Hence, while this Court has dealt with large urban school districts in the past, including Topeka, Kansas, *Brown* v. *Board of Education,* 347 U.S. 483; Little

Rock, Arkansas, *Cooper* v. *Aaron*, 358 U.S. 1; Knoxville, Tennessee, *Goss* v. *Board of Education*, 373 U.S. 683; Richmond, Virginia, *Bradley* v. *School Board*, 382 U.S. 102; Montgomery, Alabama, *United States* v. *Montgomery County Board of Education*, 395 U.S. 225; and Memphis, Tennessee, *Northcross* v. *Board of Education*, 397 U.S. 232, the Court has not had an occasion to define with any degree of finality the constitutional obligations—particularly the pupil assignment obligations—of such school systems. The *Green-Raney-Monroe* trilogy presented issues associated with traditional dualism. In the circumstances of those cases, freedom of choice and free transfer were held to be unacceptable methods of student assignment because they maintained racial segregation by tacitly perpetuating dual, overlapping attendance areas, "[t]he central vice in a formerly de jure segregated public school system," *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 867 (C.A. 5), affirmed on rehearing, 380 F. 2d 385 (C.A. 5) (en banc), certiorari denied *sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840.

In accordance with the mandate of *Green* and this Court's definitive announcement in *Alexander* v. *Holmes County Board of Education, supra,* and *Carter* v. *West Feliciana Parish School Board, supra,* that dual systems must be converted "at once," nearly all of the traditionally dual school districts are desegregating by implementing desegregation plans based on compact geographic zones and grade restructuring, through either litigation or voluntary

agreements with the United States Department of Health, Education, and Welfare.[2]

Most of these are rural systems which, by the use of contiguous zoning and contiguous pairing, have converted to systems "without a 'white' school and a 'Negro' school, but just schools." *Green,* 391 U.S. at 442. In urban school systems like Mobile and Charlotte, however, the constructive use of contiguous zoning and pairing places biracial student populations in most, but not all, schools. This distinction was well stated by Judge Butzner in the *Charlotte* case below:

> All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering, or consolidating schools and transporting pupils. Some cities, in contrast, have black ghettos so large that integration of every school is an improbable, if not an unattainable, goal. [App. 1267a–1268a.]

In this respect, then, these cases present issues of first impression for this Court and may require the Court to distinguish between rural and metropolitan school districts.

I. THE CHARLOTTE AND MOBILE SCHOOL SYSTEMS HAVE FOLLOWED POLICIES AND PRACTICES WHICH PERPETUATE THE DUAL SYSTEM

Racial dualism in large urban systems may be found not only in overlapping attendance areas but also in

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[2] See Appendix, *infra*, for a summary of the status of school districts in eleven Southern states, which brings up to date the table in the Appendix to the government's Supplemental Memorandum filed in this Court in *Alexander* v. *Holmes County Board of Education*, No. 632, October Term, 1969.

the organizational decisions of the system in furtherance of racial separation. It may be manifested in distorted grade structures, outsized schools, gerrymandered zones, curriculum manipulation, and various other devices for accommodating the organization of the system to fluctuating racial residential patterns.

Neither North Carolina nor Alabama presently requires racial segregation in public education by law; and insofar as an official policy of segregation plays a part in defining the Charlotte and Mobile school boards' present constitutional obligation, it is meaningful only to the extent that it is manifested in the decision-making (involving both long-range planning and day-to-day operations) of the boards. Accordingly, all of those decisions must be considered in determining the extent to which a school district has engaged in discrimination contrary to *Brown of Education,* 347 U.S. 483. See *Brown* v. *Board of Education,* 349 U.S. 294, 300–301; *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836 (C.A. 5). See, also, *Smith* v. *Texas,* 311 U.S. 128, 132.

Site selection and school construction are important aspects of a school board's decision-making responsibilities in school districts characterized by racial residential segregation, because they have been used as substitutes for dual zoning. The records in both *Charlotte-Mecklenburg* and *Mobile* suggest that the school boards have consciously selected building sites and

constructed schools in a manner designed to perpetuate separate schools for whites and blacks. Thus in 1963, when the Mobile board sought a stay of a Fifth Circuit order directing it to commence admitting Negro students to white schools under the Alabama pupil-placement laws, the board argued that

> desegregation would "seriously delay and possibly completely stop" the Board's building program, "particularly the improvement and completion of sufficient colored schools which are so urgently needed." In recent years, more than 50% of its building funds, the Board pointed out to the parents and guardians of its colored pupils, had been spent to "build and improve colored schools," and of eleven million dollars that would be spent in 1963, over seven million would be devoted to "colored schools."

Board of School Commissioners v. *Davis,* 11 L. Ed. 2d 26, 28 (Black, J., on application for a stay). As Mr. Justice Black then observed, "It is quite apparent from these statements that Mobile County's program for the future of its public school system 'lends itself to perpetuation of segregation,' a consequence which the Court recently had occasion to condemn as unlawful." *Id.* at 28–29. This policy continued until at least June of 1969. See *Davis* v. *Board of School Commissioners of Mobile County,* 414 F. 2d 609 (C.A. 5).

Similarly, in *Charlotte-Mecklenburg* the district court found that the "[l]ocation of schools in Charlotte has followed the local pattern of residential development, including its *de facto* patterns of segre-

gation. With a few significant exceptions * * * the schools which have been built recently have been black or almost completely black, or white or almost completely white, and this probability was apparent and predictable when the schools were built." *Charlotte* App. 305a; see *id.* at 456a–457a.

Other necessary educational and administrative decisions must be coordinated with a school-construction program; and the record in *Mobile* is especially clear on the potential effects of those decisions on racial separation. The capacities of schools can be based on the size of the racially identifiable areas they are to serve. Two junior high schools were constructed, for example, to serve relatively small white neighborhoods virtually surrounded by predominantly Negro residential areas; accordingly, the capacities of those schools were far smaller than the capacities of other schools in the system serving the same grades. Brief for Petitioners in *Mobile,* Appendix at 15, n. 24. The same is true of grade structures. No reason can satisfactorily explain, for instance, why one all-Negro school was the only school in the city to offer all twelve grades except that the Negro area to be served by the school was relatively small, compact, and surrounded by white residential areas.[3] *Id.* at 4, 15 n. 24; see, also, *id.* at 10. The *Mobile* record contains evidence of numerous instances in which port-

[3] That school has now been fully desegregated by reducing the number of grades and expanding the neighborhood zone to be served.

able classrooms were used at schools serving one race while nearby schools offering the same grades but serving another race operated under capacity. *Id.* at 10–11; see, also, *id.* at 64–67. The location of attendance-zone boundaries (including the use of noncontiguous zones) has also been utilized in *Mobile* to produce segregation. *Id.* at 7–9.

We submit, therefore, that the constitutional violations which have occurred in these two cases are the products of a process of decision-making in which the state chose, in spite of the availability of feasible alternatives, courses which perpetuated the racially segregated dual systems. In light of the fact that in many metropolitan school systems "black residential areas [may be] so large that not all schools can be integrated by using reasonable means," *Swann* v. *Charlotte-Mecklenburg Board of Education,* No. 14,517 (C.A. 4) (App. 1267a), it is appropriate, therefore, to look to that decision-making process as the focal point of a proper remedy. Accordingly, an appropriate remedy is to require that the governmental decisions affecting racial segregation be so made and implemented, when feasible alternatives are available, as to disestablish the dual system and eliminate its vestiges. In this sense, the remedy is a dynamic one, cf. *Clark* v. *Board of Education of Little Rock School District,* 426 F. 2d 1035 (C.A. 8), and not a static one. And, as we shall now show, it does not require, as an *a priori* constitutional standard, racial balance or integration of every all-white, all-Negro, or predominantly Negro school.

II. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE, AS A MATTER OF LAW, RACIAL BALANCE IN ALL PUBLIC SCHOOLS OR INTEGRATION OF EVERY ALL-WHITE OR ALL-NEGRO SCHOOL

The plaintiffs-petitioners in both *Charlotte-Mecklenburg* and *Mobile* argue that school boards have a constitutional obligation to eradicate the "racial identifiability" of all schools within their jurisdiction. In this view a predominantly Negro school would be "racially identifiable" in a school district having a majority of white students such as Charlotte and Mobile. It would appear that all school boards, according to the petitioners' theory, must be required to ensure that the ratio of white to black students in each school is as near as possible to the ratio of white to black students in the system as a whole. We do not agree that either general constitutional principles[4] or the holdings of this Court or the courts of appeals with respect to disestablishment of dual school systems compel acceptance of this formulation of school boards' remedial duty. In our view, "[h]ow far that duty extends is not answerable perhaps in terms of an unqualified obligation to integrate public education without regard to circumstance * * *." *Branche* v. *Board of Education of Hempstead,* 204 F. Supp. 150, 153 (E.D.N.Y.).

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[4] It is, of course, clear that the Fourteenth Amendment's requirement of due process and equal protection does not, by itself, prescribe any particular racial (or other) admixture in the membership of individual institutional groups, such as a particular jury. *Cassell* v. *Texas,* 339 U.S. 282.

As the court of appeals stated in the *Charlotte* case, "if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation * * * should not void an otherwise exemplary plan for the creation of a 'unitary school system'" (App. 1268a). Neither, on the other hand, do the decisions support the use of racial quotas, as in the Charlotte-Mecklenburg school board's plan, as a limitation on the extent of a school board's remedial obligation.

Federal courts have made basically three uses of such expressions as "racially identifiable schools," "all-Negro schools," and "racial balance," none of which supports the near-absolute standard suggested by the plaintiffs-petitioners. The courts have used these expressions as a characterization of the state's holding out a classically dual school system in tacit perpetuation of legally required segregation, as an analytical starting point, and as a convenient reference to a remedial standard requiring the comparison of available alternatives.

This Court said in *Green* that an acceptable desegregation plan must "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442. But that remark was made in the context of the state's holding out one school for whites and another for blacks serving the same attendance area, just as it had done when racial segregation was enforced by law. In holding that the state could not maintain such a system, even though it had the appearance of racial

neutrality in the sense that student assignments were based on free choice, this Court might well have said that the schools of New Kent County must be merged or "racially balanced," for the simplest techniques of effecting desegregation (such as zoning and pairing, see 391 U.S. at 442 n. 6) would necessarily promise exactly that result in the circumstances of that case. It was in the same context, namely, the failure of freedom of choice to alter significantly the racially dual attendance patterns of the past, that the Court of Appeals for the Fifth Circuit adopted the rule, now moribund, that an existing student-assignment plan was unacceptable if it retained an all-Negro school. See, *e.g.*, *Adams* v. *Mathews*, 403 F. 2d 181 (C.A. 5); *Hall* v. *St. Helena Parish School Board*, 417 F. 2d 801 (C.A. 5), certiorari denied, 396 U.S. 904; *United States* v. *Hinds County School Board*, 417 F. 2d 852 (C.A. 5), related order reversed *sub nom. Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (reversing as to timing). But see *Harris* v. *St. John the Baptist Parish School Board, sub nom. Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211, 1221 (C.A. 5) (en banc).

The Fifth Circuit, although no longer relying on a standard of no all-Negro schools, has required a showing and findings of the specific "reasons, if any, for the continuation of any all Negro or all white schools" under proposed desegregation plans. *Singleton* v. *Jackson Municipal Separate School District*, No. 29,226, at 14 (C.A. 5, May 5, 1970); *Andrews* v. *City of Monroe*, 425 F. 2d 1017, 1021 (C.A. 5). This

requirement, obviously, is an analytical starting point designed to inform the court of appeals of both the extent to which racial concentration remains in a school district and the feasibility of reducing concentration by alternative means. For numerous recent decisions of that court, including the decision in *Mobile,* have approved plans even though all-Negro schools remained. See, *e.g., Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28,639 (C.A. 5), modified on rehearing (C.A. 5, July 28, 1970); *Valley* v. *Rapides Parish School Board,* No. 30,099 (C.A. 5, Aug. 25, 1970); *Mannings* v. *Board of Public Instruction of Hillsborough County,* No. 28,643 (C.A. 5, May 11, 1970). Similarly, the Court of Appeals for the Eighth Circuit observed with respect to racial balance:

> We do not rule that precise racial percentages across the District at the respective elementary, junior high, and high school levels are as yet constitutionally required. * * * We certainly can conceive of a fully desegregated system where percentages do vary from school to school and in which even one school might have a black majority and another a white majority but still, when all factors are fairly and unemotionally considered, the system is "unitized" within the Supreme Court's *Alexander* requirement. That happy day may not yet be upon us and until it arrives percentages may be more significant than they eventually deserve to be.

Kemp v. *Beasley,* No. 19,782, at 14–15 (C.A. 8, March 17, 1970) (El Dorado, Arkansas); see *Swann* v.

Charlotte-Mecklenburg Board of Education, 306 F. Supp. 1299, 1312 (W.D.N.C.) (App. 710a); *United States* v. *Georgia,* C.A. No. 12,972 (N.D. Ga., Dec. 17, 1969) (and subsequent orders amending the formula in light of the circumstances of individual school districts).

Finally, the standard of no predominantly Negro schools has been used as a means of translating into remedial terms a finding, in view of available alternatives, of the extent to which racial concentration could feasibly be eliminated. See, *e.g., Spangler and United States* v. *Pasadena City Board of Education,* unreported order entered on findings and conclusions reported at 311 F. Supp. 501 (C.D. Calif.). Such an articulation of remedial obligations cannot be read in the unyielding terms suggested by the plaintiffs-petitioners. Indeed, the district court in *Charlotte-Mecklenburg,* while approving the plan supported by the plaintiffs, was careful to point out, "This court has not ruled, and does not rule that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; * * * nor that the particular order entered in this case would be correct in other circumstances not before this court." *Swann* v. *Charlotte-Mecklenburg Board of Education,* C.A. No. 1974, at 12 (W.D.N.C., Aug. 3, 1970); see *id.* (Feb. 5, 1970) (App. 822a). Insofar as such remedial expressions are made on the basis of a record and findings on "the availability to the board of other more promising courses of action," 391 U.S. 439, they

represent no departure in constitutional principle from *Green,* which directed district courts to assess proposed plans "in light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Ibid.*

The desegregation plan supported by the Charlotte-Mecklenburg school board is based on the premise that "[n]o school district to which white students are assigned should have less than 60 per cent white student population * * *." App. 671a. In the factual circumstances of the Charlotte school system, this rule, when coupled with the board's declining to consider any technique of desegregation except geographic zoning, inevitably constitutes a limitation on the extent of desegregation to be achieved: Whenever an all-Negro school could not be so zoned as to make it at least sixty percent white, this limitation would require that it remain all-Negro. As the district court observed, such a use of a " '60–40' ratio is a one-way street," App. 701a, and the court of appeals properly rejected it. App. 1276a. See *Lee* v. *Macon County Board of Education,* C.A. No. 604–E (M.D. Ala., April 3, 1970) (Conecuh County); *Brewer* v. *School Board of City of Norfolk,* No. 14,544 (C.A. 4, June 22, 1970), reversing 302 F. Supp. 18, 308 F. Supp. 1274 (E.D. Va.). No use of racial quotas "of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." *Goss* v. *Board of Education,* 373 U.S. 683, 689.

III. THE CHARLOTTE AND MOBILE SCHOOL BOARDS ARE REQUIRED, IN CONVERTING FROM DUAL TO UNITARY SYSTEMS, TO MAKE ORGANIZATIONAL AND ASSIGNMENT ADJUSTMENTS TO ELIMINATE THE VESTIGES OF THE DUAL SYSTEM BUT NOT TO ACHIEVE ANY PARTICULAR RACIAL BALANCE OR RATIOS

1. Clarification of the proper remedial standards in this field thus begins, in our view, with recognition of the basic principle that the constitutional requirement of "a completely unified, unitary, nondiscriminatory school system" (*Montgomery*, 395 U.S. at 235) is not a requirement that racial balance need be achieved in all schools within the system or that all instances of non-discriminatory racial isolation need be eliminated. It is, instead, a requirement of a school "system in which racial discrimination * * * [has been] eliminated root and branch" (*Green*, 391 U.S. at 438). It follows that the constitutional objective can, in most situations, be achieved by means of any of a variety of methods of pupil assignment, and that the choice of the particular method, or combination of methods, to be employed is a matter of educational policy within the discretion of the school board—so long as that choice accomplishes the constitutional objective. As this Court said in *Green* (391 U.S. at 439):

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circum-

> stances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. * * *

Indeed, the Court in *Green* specifically declined to "hold that 'freedom of choice' can have no place in such a plan," or "that a 'freedom-of-choice' plan might of itself be unconstitutional" (391 U.S. at 439), even though it noted that "the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation" (391 U.S. at 440) and held that in the three cases before it the freedom-of-choice plans were constitutionally inadequate. And the Court specifically indicated in *Green* that either geographic zoning or pairing (consolidation) of the two schools in the rural district involved in that case would be an acceptable method of pupil assignment (391 U.S. at 442 n. 6).

We submit that a system of pupil assignment on the basis of contiguous geographic (residential) zones—the "neighborhood" school system, which is the most familiar and traditional method of pupil assignment employed throughout the Nation—is constitutionally acceptable in desegregating urban school systems also. We recognize, however, that where dual systems have previously been maintained, school buildings and facilities will frequently be located on sites which would not have been chosen had the system been operated on a unitary basis, and that there will generally be available to school boards more than one choice of pupil

assignment plans which would be consistent with the neighborhood school concept.

In many such districts the constitutional adequacy of the "neighborhood school" method of converting a dual system into a unitary one will, accordingly, depend on the choice of those complementary techniques designed to eliminate the effects of state-imposed discrimination that would otherwise remain (see *supra,* pp. 13–16). The techniques available to school officials include:

> (*a*) Change the grade structure. A school with fewer grades can accommodate more children in each grade, so that it would serve a larger area.
>
> (*b*) Permit students to transfer from a school in which their race is in the majority to one in which it is in the minority. The courts below, in adopting this technique, also required that such students be provided transportation.
>
> (*c*) Close unneeded or substandard schools.
>
> (*d*) Draw zone lines so that they cut across racially impacted residential areas instead of encircling them.
>
> (*e*) Plan new construction of school facilities so as to serve students of both races.

All of these techniques are utilized in the plan approved by the court of appeals in *Mobile,* and they have been used successfully elsewhere. See, *e.g., Singleton* v. *Jackson Municipal Separate School District,* No. 29,226 (C.A. 5, Aug. 12, 1970); *Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28,639 (C.A. 5, July 28, 1970); *Mannings* v. *Board of Public*

Instruction of Hillsborough County, No. 28,643 (C.A. 5, May 11, 1970); *Henry* v. *Clarksdale Municipal Separate School District*, No. 29,165 (C.A. 5, Aug. 12, 1970). The good faith utilization of such techniques to promote desegregation would, in our view, ordinarily enable any district which prefers a "neighborhood" school policy to achieve compliance with constitutional requirements by means of that method of pupil assignment.[5] Such racial isolation as might then persist, not attributable to school officials, can best be undone through the action of the numerous public and private agencies and individuals whose daily decisions can influence the racial composition of a neighborhood.

2. In the present cases, the courts of appeals correctly held that neither school board came forward with a pupil assignment plan adequate to meet its constitutional obligations. Nothing in the record in either case would suggest that either school board's objective in the plans it offered was anything other than to attempt to maintain racial segregation while eliminating overlapping attendance zones. This plainly did not fulfill the boards' "affirmative duty" (*Green*, 391 U.S. at 437) to eliminate the effects of racial discrimination, "root and branch" (391 U.S. at 438).

[5] Of course, the Constitution does not require the adoption of a "neighborhood" pupil assignment policy, and school districts are free, if they prefer, to choose an assignment method designed to achieve racial balance or any other non-discriminatory assignment method. See Memorandum for the United States as Amicus Curiae in *McDaniel* v. *Barresi*, No. 420, this Term.

We come, then, to the precise issue in these cases: the question of the propriety of the remedies adopted by the courts below in the face of each school board's default. This Court has consistently held, in accordance with general principles of equitable remedies, that in this situation the lower federal courts have wide discretion in formulating appropriate relief. See, *e.g.* *Brown* v. *Board of Education*, 349 U.S. 294, 299–300; *United States* v. *Montgomery County Board of Education*, 395 U.S. 225; *Green* v. *County School Board*, 391 U.S. 430, 438 n. 4, 439, 442 n. 6; *Griffin* v. *School Board*, 377 U.S. 218, 232–234; cf. *Carter* v. *Jury Commission*, 396 U.S. 320, 336–337; *Turner* v. *Fouche*, 396 U.S. 346, 355. Indeed, this Court has authorized requiring implementation of desegregation plans although recognizing that the particular plans were not the exclusive means of satisfying constitutional mandates. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290. It is, in general, incumbent on the federal courts to assess the school boards' proposals "in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness" (*Green*, 391 U.S. at 439). And, "in this field the way must always be left open for experimentation" (*Montgomery*, 395 U.S. at 235).

In *Mobile*, we believe that the plan approved by the court of appeals meets these standards. It is basically a "neighborhood" school plan, supplemented by judi-

cious use of complementary techniques (see *supra*, p. 25) designed to minimize residual racial isolation. Especially in light of the court's inclusion of a majority-to-minority transfer option and its scrupulous attention to desegregation of faculty and of school facilities and activities (See Pet. App. 12a–13a, 16a), the plan, in our view, "promises realistically to work, and promises realistically to work *now*" (*Green*, 391 U.S. at 439). It should, of course, be re-evaluated in practice by the courts below, after it has been in operation for a sufficient time (see 391 U.S. at 439; *Raney* v. *Board of Education*, 391 U.S. 443, 449).

In *Charlotte*, we believe the court of appeals correctly sustained the district court's judgment as to the junior and senior high schools, in light of the unacceptability of the school board's proposal and the feasibility and practicality of the court's modifications thereof. We also believe the court of appeals was correct in remanding the case to the district court for further consideration of that aspect of the court's order requiring far-reaching cross-busing of elementary school pupils, since the district court had initially indicated some doubt as to whether racial balance was the constitutionally required objective (see App. 710a) and may, therefore, have exercised its remedial discretion in pursuit of an erroneous constitutional standard. On remand, the district court reconsidered the matter. Although it had another opportunity to do so, the school board again failed to come forward with a constitutionally adequate plan. The Department of Health,

Education, and Welfare did submit a plan of contiguous zoning which we believe was constitutionally acceptable, but the school board objected to it strongly and indicated that it might prefer the court's original plan.*

In these circumstances the district court rejected the HEW plan. If the decision of the district court was based on an understanding that racial balance is a constitutional requirement, it cannot be supported for the reasons stated in earlier portions of this brief. In light of the fact that the plan ultimately adopted by the court went beyond the HEW plan in departing from the neighborhood school concept, and the fact that the school board rejected any alternative to its own plan which failed, in our opinion and the opinions of the courts below, to meet constitutional requirements, we believe that in further consideration of the problem the board should be required to choose

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* See Transcript of Hearing, July 15–24, 1970, at 1071, 1077–1078 (Mr. Waggoner, attorney for the school board):

> The HEW plan, under anybody's estimation, is a plan that doesn't produce any satisfactory solutions in any way.
>
> * * * * *
>
> So we take the position, if the Court please, that there is no reasonable alternative between the Finger plan and the Board plan, the alternatives suggested here or portions thereof are unreasonable, and this places * * * the Board and the plaintiffs in the difficult position of seeing a situation where an appellate court has ruled one plan doesn't go far enough and the other plan goes too far. We feel this is where the chips in this case fall, there is no middle ground.

See, also, *id.* at 1113.

from among those plans in the record, including the "Finger" plan, the minority board plan, and the HEW plan, or in the alternative submit to the district court a plan meeting the standards and requirements of the Constitution as enunciated by this Court.

The decisions below should not be regarded as prescribing the only method of pupil assignment which may, in the future, be used in these districts. It is still the school boards, and not the federal courts, that have the authority, within constitutional limitations, to make educational policy—including pupil assignment policy. The role of the courts in these matters arises only because of the school boards' failure to fulfill their constitutional obligations. So long as that failure persists, the courts must, to a limited extent, assume the functions of the school boards and, within the traditional confines of equitable discretion, engage in "experimentation" (*Montgomery,* 395 U.S. at 235) comparable to that appropriate for the boards in achieving the constitutionally required objective. The boards are free, however, to reassert their authority whenever they wish, by coming forward with constitutionally acceptable proposed modifications of the court's plan or with an entire new plan that meets constitutional standards. We see no reason why the school boards in these cases should not be permitted to propose, for the approval of the courts below, new pupil assignment plans (if they so desire) for implementation in the 1971–1972 school year.

CONCLUSION

In view of the district courts' express retention of jurisdiction to entertain amendments to the plans,[7] it would be appropriate for this Court to enunciate the standards which are applicable to cases of this sort and to remand the cases to those courts for further proceedings in the light of those standards.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

OCTOBER 1970.

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[7] The August 3, 1970, decision of the district court in *Charlotte* properly retained jurisdiction pursuant to the directive of the court of appeals that "after a plan has been approved, the district court may hear additional objections or proposed amendments, but the parties shall comply with the approved plan in all respects while the district court considers the suggested modifications." In *Mobile* the court of appeals also directed the district court to retain jurisdiction.

APPENDIX

The following status report on eleven southern states as of September 1970, indicates how many school districts were unitary prior to 1970–71, how many are committed to terminal 1970–71 plans, and how many are currently not committed to a terminal 1970–71 plan. This information was compiled from a central status report now maintained jointly by the Department of Justice and the Department of Health, Education and Welfare. While absolute accuracy in placing school systems in appropriate categories is not possible, every effort has been made to reconcile the sometimes conflicting information by using the most recent data.

Under the heading "Unitary Prior to 70–71" are included the following:

1. Those desegregated districts as enumerated by HEW.
2. Those few districts operating under court-ordered freedom of choice plans which, according to the statistics, are effectively desegregating the systems.
3. Those districts ordered by district courts to desegregate totally before 1970–71.

Under the heading "Committed—1970–71 Terminal" are included:

1. Those districts for which the district court has ordered a terminal 1970–71 plan.
2. Those districts for which such a plan has been achieved through voluntary agreement with HEW.

Under the heading "Uncommitted—1970–71 Terminal" are included:

1. Those systems currently in court proceedings where a final plan has not yet been filed or ordered.

2. Those districts which are under court order but which (a) have been ordered to implement a terminal 1971–72 plan, or (b) are operating under a freedom of choice or other court-ordered plan (terminal later than 1971–72) which does not appear to be effectively desegregating the system for 1970–71; districts in this category are not currently involved in court proceedings.

3. Those districts which are committed to neither a court order nor a voluntary plan; this category includes districts from which HEW is trying to obtain voluntary compliance, those which are involved in out-of-court negotiations with the Justice Department, and those which have reneged on voluntary plans.

Under the heading "Private Suit-Status Unknown" are included districts involved in private suits where our information regarding the progress or status of that suit is not current.

The use of the word "terminal" to describe a plan and "unitary" to describe a system means that the system has been ordered or has agreed to follow a plan which would achieve conversion to a unitary system by the fall of 1970. But some cases are on appeal, some plans may not be fully implemented, and all may still be subject to challenge or modifications in the district courts. In Texas, we have classified as unitary prior to 1970–71 some all-black districts; a govern-

ment suit to merge some of these districts with integrated districts is pending. Because Texas law did not require segregation of Spanish-surnamed students, the report does not take into account litigation involving discrimination against Spanish-surnamed students.

STATUS OF SCHOOL SYSTEMS IN 11 SOUTHERN STATES

	Alabama	Arkansas	Florida	Georgia	Louisiana	Mississippi	North Carolina	South Carolina	Tennessee	Virginia	Texas	Total
Unitary prior to 1970-71	22	205	35	66	33	63	96	12	100	107	1,126	1,866
Committed: 1970-71 terminal:												
Court order	98	18	23	102	26	56	10	22	23	14	28	420
Voluntary plan	0	48	9	13	3	28	35	49	0	11	35	240
Subtotal	120	271	67	181	62	147	143	93	141	122	1,189	2,666
Uncommitted: 1970-71:												
In current court proceedings	2	7	0	1	2	1	4	0	0	1	4	22
Under court order:												
(a) 1971-72 terminal	1	1	0	0	0	1	0	0	0	0	0	3
(b) Not unitary and not in current court proceedings	1	1	0	1	1	0	0	0	0	0	0	13
Not committed to voluntary plan and not in litigation	0	3	0	5	1	1	2	0	3	0	2	17
Subtotal	4	12	0	7	4	3	6	0	3	1	15	55
Private suit—Status unknown	0	3	0	3	0	0	4	0	5	2	3	20
Total number of districts	124	286	67	191	66	150	153	93	149	135	1,207	2,721

U.S. GOVERNMENT PRINTING OFFICE: 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

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JAMES E. SWANN, *et al.*,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Respondents.

No. 349

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina 28202

C. O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina 27702

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

Attorneys for Petitioners and Cross-Respondents

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REPLY BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

Preliminary Statement

The respondents and cross-petitioners (hereinafter school board) seek to pose the issue in this case of whether a school board may continue to operate one or more pre-

dominantly black schools. We feel that the issue is more properly posed in the decision of the district court below, namely, whether in the context of the facts developed in this case, the pervasive role of the state and its agencies in creating and perpetuating a racially segregated system, a school board may continue to deny equal educational opportunities to black children on the pretext of preserving "neighborhood schools" or avoiding transportation of students when a feasible alternative is available for complete desegregation. This reply is addressed to the activities and practices of the state, particularly those of the school board, which produced the segregated system which the district court sought to eliminate; the feasibility and practicability of the plan directed by the court; and the fact that the school board and the various amici who have submitted briefs in this matter suggest no viable alternative rule of law to that adopted by the district court and advocated by the petitioners herein. We also discuss the possible applicability of the decision of the Court in this case to other jurisdictions and the applicability of §§401(b) and 407(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000c(b) and 42 U.S.C. §2000c-6(a).

For the Court's information we are attaching as an appendix to this reply a copy of the interim report filed by the school board showing the results of desegregation for the present school term under the plan directed by the district court. As the report demonstrates the plan eliminates all racially identifiable schools in the system with the exception of 3 elementary schools and as to these 3 schools some steps are now being taken in order to alleviate the overcrowded conditions and to prevent resegregation.

ARGUMENT

I.

The Charlotte-Mecklenburg County Schools Were Segregated by Unconstitutional Governmental Action.

The School Board and several amici[1] challenge for the first time the district court's findings of state created and perpetuated racially segregated housing and public schools.[2] They contend that the admitted segregation is merely adventitious. The record, however, clearly demonstrates the contrary. As the district court stated in its Memorandum Opinion of November 7, 1969, segregation of the races in the Charlotte-Mecklenburg system is not "constitutionally benign."

> In previous opinions the facts respecting [the location of schools] . . . their controlled size and their popu-

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[1] See, e.g., Amicus Curiae Brief for the Classroom Teachers Association of the Charlotte-Mecklenburg School System, Incorporated, pp. 20-21.

[2] The Commonwealth of Virginia suggests that such inquiry is irrelevant. See, e.g., Brief for the Commonwealth of Virginia, Amicus Curiae, pp. 8-10. The district court found, however, that the varied actions of the state, including the School Board, had resulted in racially segregated schools as condemned in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955); that inquiry into the forces of the state creating or perpetuating racial discrimination were indeed appropriate and required by decisions of this Court; see, e.g., *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), for the Fourteenth Amendment prohibits "State support of segregated schools through any arrangement, management, funds, or property." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). This Court further stated in *Cooper*, supra at 17: "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly . . . nor nullified indirectly . . . through evasive schemes for segregation whether attempted 'ingeniously' or 'ingenuously.'" Finding state imposed segregation and a feasible means to correct it, the district court was obligated by the Constitution to enforce the constitutional rights of the black children of this school system.

lation have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school buses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or "de facto," and the resulting schools are not "unitary" or desegregated.[3] (657a, 661a-662a).

---

[3] Contrary to the board's assertion (see Briefs of Respondents and Cross-Petitioners, p. 46), this finding did not constitute a reversal of the previous findings of the court; rather it was at this point that the court was pointedly advised by the board, that the board had no intention of complying with the directives of the court. The district court has described its painstaking, patient, but unsuccessful efforts to encourage the board to discharge its affirmative duty to desegregate. (See Supplemental Memorandum 1221a-1238a). It was the board's recalcitrance which led Judge Sobeloff to note in dissent that "this Board, through a majority of its members, far from making 'every reasonable effort' to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn." (No. 9, 1291a-1293a) Moreover, the record clearly demonstrates that the constitutional violations which the district court sought to remedy resulted not just from practices of other governmental agencies but to a large extent from the board's conduct and action in locating and controlling schools, school sites, capacities, attendance districts, etc., all taken in conjunction with and in furtherance of the developing racial housing patterns, both before and after this Court's decision in *Brown*.

We discuss below some of the record evidence supporting these findings.

In the district court's findings of April 23, 1969 (285a, 296a), the court described Charlotte and Mecklenburg County as follows:

> The central city may be likened to an automobile hubcap, the perimeter area to a wheel, and the county area to the rubber tire. Tryon Street and Southern Railroad run generally through the county and the city from the northeast to the southwest. Trade Street runs generally northwest to southeast and crosses Tryon Street at the center of town at Independence Square. Charlotte originally grew along the Southern Railroad tracks. Textile mills with mill villages, once almost entirely white, were built. Business and other industry followed the highways and the railroad. The railroad and parallel highways and business and industrial development formed something of a barrier between east and west.
>
> By the end of World War II many Negro families lived in the center of Charlotte just east of Independence Square in what is known as the First Ward-Second Ward-Cherry-Brooklyn area. However, the bulk of Charlotte's black population lived west of the railroad and Tryon Street and north of Trade Street in the northwest part of town. The high-priced, almost exclusively white, country was east of Tryon Street and south of Trade in the Myers Park-Providence-Sharon-Eastover area. Charlotte thus had a very high degree of segregation of housing before the first Brown decision.

Today, the degree of segregation in housing is even more pronounced. Some of the factors which have contributed to the school segregation follow:

1. *Location and control of schools.* Prior to 1954 all public schools in the City of Charlotte and Mecklenburg County were segregated pursuant to the state law and Constitution.[4] The district court attached as an Exhibit to its Memorandum of Decision and Order of August 3, 1970 a collection of segregation codes of the state which, as indicated by the Memorandum Decision (Br. A4), remained in the state statutes as late as 1969. Schools were located and students and staff personnel were assigned to the various schools on the basis of race. Subsequent to the *Brown* decision and prior to the institution of this proceeding no affirmative steps were taken by the board to disestablish the racially segregated system. Some token integration did take place under the North Carolina Pupil Assignment Act, N. C. Gen. Stat. §115-176, pursuant to which a few black students requested transfer to previously all-white schools. The school board, however, continued to locate and control the various capacities of schools in order to maintain racial segregation.[4a] These practices have continued even through the present day.

In conjunction with the racially developing residential patterns, the school board built or made additions to the following schools subsequent to 1954 solely to accommodate black students.

---

[4] Separate boards governed the city and county schools until 1961, at which time the two school units were merged.

[4a] The board controlled grade structures to maintain segregation. In 1965 the system had a basically 6-3-3 grade structure, except that some black schools had different patterns to facilitate racial segregation such as grades: 1-4, 1-7, and 5-9, for example. (See Appellants' Appendix in 1966 appeal to the 4th Circuit, No. 10207, pp. 25-29).

Schools	Year of Construction	Years of Additions
Burns	1968	
Marie Davis	1951	1953 1957 1959
Double Oaks	1952	1955 1965
Druid Hills	1960	1964
First Ward	1912	1950) 1961) 1968) practically complete new facilities.
Lincoln Heights	1956	1958
Oaklawn	1964	
University Park	1957	1958 1964

(Plaintiff's Exhibit 1 in original record; 124a-132a)[5]

Several white schools were built in white areas and predictably enrolled only white students:

Schools	Year of Construction
Devonshire	1964
Albemarle Road	1968
Beverly Woods	1969

These examples are not meant to be exclusive but only exemplary of the practices followed by the board prior

---

[5] "Q. Dr. Self, when you built schools since 1954, what efforts did you make, other than what you testified to yesterday, to locate the schools in an area that would effect the greatest maximum integration of students in the system? A. The schools were located in such a way as to house the youngsters, Mr. Chambers, not to effect a maximum amount of integration.

"Q. You did not attempt to do it? A. We made an attempt to house the youngsters in the neighborhood." (132a)

• • •

"Q. And I think that on your drawing board right now are plans to build more schools that are going to be all white and some that will be all black. A. I'm sure that the enrollment in the schools will be affected by the neighborhood served." (129a)

to and since *Brown*. (Plaintiffs' Ex. 1 in original record; 127a-129a). Even at the time of the March 1969 hearing the board was proceeding with construction of a new junior high school (Carmel Road) which under the board's most recent attendance zone plan would have been 100 per cent white (512a (designated "Project 600"), 747a).

Additionally, the board has added mobile units in order to accommodate any influx of black or white students in the segregated schools rather than redraw attendance districts and assign either black or white students to schools of the opposite race (Pls'. Ex. 1 in original record). Defendants have controlled school districts in order to limit the race of students assigned to the various schools (Compare Pls'. Exs. 1, 4, 24). As the court noted in its Opinion and Order of June 20, 1969:

> "[I]t may be timely to observe and the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of 'building schools where the pupils are' without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James obviously serve school zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not named as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true 'neighborhood school' philosophy." (455a-456a) (see also note 5, supra; 132a).

Transportation has been arranged for students in order to perpetuate segregation. Even through the 1964-65 school year, the board continued racially overlapping bus routes.

For students in the city and its immediate environs, black schools have been located within convenient walking distance of black residential areas. White schools have generally been located in outlying white residential areas necessitating bus transportation. Thus of the 23,384 students provided transportation during the 1969-70 school year only 541 of such students were transported to black schools (1014a-1032a, 1203a-1204a). Coupled with these practices the school board continued freedom of choice to permit those students enclosed within school districts of the opposite race to transfer to other schools where their race would be in the majority.

2. *Urban Renewal.* Urban renewal has contributed to the residential segregation by relocating black families from urban renewal areas to black residential areas or areas rapidly changing to black. Principally, all of the black families relocated by the city urban renewal programs, principally all of which have taken place since 1960, have been relocated in black residential areas and the few white families who have been relocated have been relocated in white residential areas. A similar practice has prevailed in the relocation of families uprooted by new streets and highways (209a-214a, 282a-283a; Plaintiffs' Exhibit 42). The court characterized this practice as follows:

> Under the urban renewal program thousands of Negroes were moved out of their shotgun houses in the center of town and have relocated in low rent areas to the west. This relocation of course involved many ad hoc decisions by individuals and by city, county, state and federal governments. Federal agencies (which hold the strings to large federal purses) reportedly disclaim any responsibility for the direction of the migration; they reportedly say that the selection of urban renewal sites and the relocation of dis-

> placed persons are matters of decision ("freedom of choice"!) by local individuals and governments. This may be correct; the clear fact however is that the displacement occurred with heavy federal financing and with active participation by local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon-railroad area, or on its immediate eastern fringe (297a-298a).

The record demonstrates, however, that even this relocation did not afford the affected families a "free" choice for, as indicated below, homes in other areas were simply not available to black families (Plf. Exhs. 14, 19, 42 in the original record; 28a-64a, 208a-215a, 282a-283a). Moreover, with the overcrowding of schools which resulted from the relocations, the school board simply added additional rooms to existing black schools to accommodate the black students.

3. *Public Housing.* Consistent with the city's zoning practices of locating multi-family and low income housing in black residential areas, all public housing, built principally since 1960 and now generally occupied by blacks, has been located in black residential areas. Even projected public housing has been designated for black residential areas (Plf. Exhs. 14, 19, 29 and 42 in original record; 215a-217a). The effects of such practices in perpetuating segregated housing is seen even in the most recent plan directed by the district court where three of the elementary schools and one of the junior high schools, projected to be predominantly white, have since the beginning of this school year become predominantly black because of the relocation of additional black families in federally financed, low-income housing in black residential areas of the four school districts (Reply Brief App. 10a-15a).

4. *City Zoning.* City zoning has influenced separation of the races by marking out and designating by land usage those areas of the city occupied by blacks and those occupied by whites. Beginning in 1947, the city enacted its first zoning ordinance and in effect delineated the black and white residential areas. All white residential areas were zoned residential with restricted land usage. All black residential areas, with the exception of two small pockets adjacent to white residential areas, were zoned industrial for multi-land usage, including heavy industry, multi-family homes and high density areas. Even the two excepted black areas were zoned for higher density use than the white residential areas (174a, 202a-207a, 251a, 268a, 272a-283a). This difference in zoning practices for black and white residential areas has been carried forward to the present day in the major revisions of the zoning ordinance in 1962.

Industrial zones have continued to be restricted to black residential areas. Additionally, the residential zoning authorized for the black areas in the 1962 zoning ordinance has been limited to high density zones, R-6 and R-9 requiring 6,000 square feet and 9,000 square feet, respectively, for a single family home. No black residential area in the City today has a higher density zoning than R-9 while principally all white residential areas have restricted zoning of R-12, R-15 or above (206a-208a; Plf. Exh. 10 in original record (maps showing present zoning for city of Charlotte)). As testified by plaintiffs' witness during the March 1969 hearing, the effect of such zoning makes the land in the black residential areas accessible to other uses; permits the rapid deterioration of the quality of the land—"and this is clearly evident from the amount of industrial development which has taken place in areas of Negro residences;" reduces the housing value; and introduces blighted and noxious usages into the area (204a).

It delineates for governmental and private developers, school officials and home buyers and renters those areas of the city for blacks and those for whites.

5. *City Planning.* City planning has further enforced segregation in housing. In a comprehensive proposal in 1960 entitled "The Next Twenty Years" (Plf. Exh. 12 in the original record), the City Planning Commission proposed the continuation of basically the same racially discriminatory zoning practices with high density and multi-land usage in black residential areas and restricted zoning in the white residential areas. While the proposal itself, absent approval by the City Council, should have no controlling effect, it nevertheless provided the blueprint for developers of what land usage would be permitted in the future. As plaintiffs' witness testified:

> The only elements of the plan which develop any compelling force are those elements which relate to facilities or land uses which are normally provided by government, things such as roads, or public buildings. Quite naturally, the development of residential or industrial land is subject to the decision-making of private developers within, of course, whatever the legal constraints are which the city imposes. But the plan very definitely sets a direction in the recoommendations which it develops and it's those recommendations which are particularly significant in this case (188a).
>
> • • •
>
> This planning document ["The Next Twenty Years"] was developed in 1960 so that this is the major impact. The secondary effect of this document is the proposed interstate highway system and the major arterial streets in the Charlotte area. And again one can see that the major north-south route—I-77—tends to reinforce this north-south division by running adjacent

to and parallel to the industrial band which runs through the city [separating the black residential area on the west from the white residential area on the east] (195a, 196a).

The Planning Commission's proposal was largely enacted by the City Council in the revised zoning code of 1962 (202a, 220a).

6. *Streets and Public Highways.* Streets and public highways have perpetuated barriers between the races. Streets have been designed to provide ease of communication only within the separate white or black residential areas with little means of communication between them. Additionally, one of the major federally financed interstate routes now being constructed through the city, the North-South Expressway (I-77), further marks, along with the Tryon Street-Southern Railroad, the division between the racially separate areas (195a, 216a-217a; Plf. Exh. 13 in original record).

7. *Private Discrimination.* Private discrimination has been pervasive in establishing and perpetuating the racially segregated housing that exists in the city. Blacks simply have been denied access or the right to purchase or rent in white residential areas. Construction firms and real estate agents and banking institutions, including the federal government, have planned and developed racially segregated areas. As the court below noted (1264a), such developments were perpetuated by racially restrictive covenants which were enforced by the North Carolina Supreme Court until this Court's decision in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). See, e.g., *Phillip* v. *Wearn*, 226 N.C. 290, 37 S.E. 2d 895 (1946); *Eason* v *Buffaloe*, 198 N.C. 520, 152 S.E. 496 (1930); *Vernon* v. *R. J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710 (1946). Such developments have been followed by the school board with con-

struction of new schools "to house the youngsters in the neighborhood." (132a) Black areas or developments have been purposely located west of the Tryon Street-Southern Railroad dividing line and white developments on the east side of the dividing line. Prior to the 1968 Civil Rights Act, 42 U.S.C. §§3601 et seq., real estate agents were bound by their code of ethics to perpetuate this policy of discrimination (Plf. Exhs. 33, 34, 35, 36 in original record; 28a-57a, 282a-283a). Limitations on the ability and freedom of blacks to purchase and rent homes in other areas of the city continue today.[6]

The school board now proposes to engraft on this segregated system, district and housing pattern zones which would leave the majority of the black and white students in racially segregated schools (See projected enrollment under board's plan of February 2, 1970, 744a-748a). The pervasiveness of the state practices in creating and perpetuating the housing patterns and segregated schools is no different than the former constitutional provisions compelling racial separation in public schools. It is clearly illusory to contend otherwise for the black students in the all black and predominantly black schools would be locked into those schools just as effectively and with as much state control as they were under the former compulsory system rejected in *Brown*. Cf. *Brewer* v. *School Board of City of Norfolk*, 397 F.2d 37, 41-42 (4th Cir. 1968). The district court addressed this problem in its Memorandum Decision and Order of August 3, 1970.

> "The principle difference between New Kent County, Virginia, and Mecklenburg County, North Carolina, is

[6] A black family which moved into a home in a white residential area of the city on September 4, 1970 was intimidated and threatened repeatedly and nightriders fired shotgun blasts into their home while the family was asleep. *Charlotte Observer*, Sept. 5, 1970, at 1A.

that in New Kent County the number of children being denied access to equal education was only 740, whereas in Mecklenburg that number exceeds 16,000. If *Brown* and *New Kent County* and *Griffin* v. *Prince Edward County* and *Alexander* v. *Holmes County* are confined to small counties and to "easy" situations, the constitutional right is indeed an illusory one. A black child in urban Charlotte whose education is being crippled by unlawful segregation is just as much entitled to relief as his contemporary on a Virginia farm." (Br. A10)

Additionally, the court noted that the issue involved here is not the validity of a "system" but the *rights* of individual people:

> If the rights of citizens are infringed by the system, the infringement is not excused because in the abstract the system may appear valid. "Separate but equal" for a long time was thought to be a valid system but when it was finally admitted that individual rights were denied by the valid system, the system gave way to the rights of individuals." (Br. A13)

The court again noted that "the essence of the *Brown* decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and breadth of experience, and that segregated education itself is inherently unequal." (Br. A15)

Testing results which the court had noted in previous orders (see Order of August 15, 1969, 579a, 586a-590a; Opinion and Order of December 1, 1969, 698a, 702a-706a; Supplemental Findings of Fact of March 21, 1970, 1198a, 1206a) further substantiated the adverse effect that racially segregated schools have on black children in the Charlotte-Mecklenburg school system.

It was this record of state imposed segregation which led the court to reject any finding of de facto or constitutionally benign racially segregated schools and housing in the Charlotte-Mecklenberg system. The Fourth Circuit held these findings to be "supported by the evidence" and accepted "them under familiar principles of appellate review." (264a).

It is these facts and findings which required that appropriate steps be taken by the school board to disestablish the state imposed segregated system.

Several lower court decision have held that school officials under these circumstances may not perpetuate segregated schools under the guise of a neighborhood system. *Henry* v. *Clarksdale Municipal Separate School District*, 409 F.2d 682 (5th Cir. 1969) *cert. den.* 396 U.S. 940 (1969); *United States* v. *Greenwood Municipal Separate School District*, 406 F.2d 1086 (5th Cir. 1969) *cert. den.* 395 U.S. 907 (1969); *United States* v. *Indianola Municipal Separate School District*, 410 F.2d 626 (5th Cir. 1969), *cert. den.* 396 U.S. 1011 (1970); *Valley* v. *Rapides Parish School Board*, 423 F.2d 1132 (5th Cir. 1970); *United States* v. *Board of Education of Baldwin County*, 423 F.2d 1013 (5th Cir. 1970); *Mannings* v. *Board of Public Instruction of Hillsborough County*, 427 F.2d 874 (5th Cir., No. 28643, May 11, 1970); *Ross* v. *Eckels*, —— F.2d —— (5th Cir. No. 30080, Aug. 25, 1970); *Kemp* v. *Beasley*, 423 F.2d 851 (8th Cir. 1970); *United States* v. *School District, 151 of Cook County, Illinois*, 286 F Supp. 786 (N.D. Ill. 1968), *affirmed* 404 F.2d 1125 (7th Cir. 1968); *Dowell* v. *School Board of Oklahoma City*, 244 F. Supp. 971 (W.D. Okla. 1965) *affirmed* 375 F.2d 158 (10th Cir. 1967), *cert. den.*, 387 U.S. 931 (1967); *Keyes* v. *School District No. 1, Denver*, 303 F. Supp. 79 (D. Colo. 1969).

Such holdings are based on the long established principle that a state may not evade the prohibition of the Fourteenth Amendment by engrafting neutral, or otherwise unobjectionable practices upon constitutionally objectionable ones, where the effects would perpetuate constitutional deprivations. See, e.g., *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Commonwealth of Pennsylvania* v. *City of Philadelphia*, 353 U.S. 230 (1957); *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); cf. *Gaston County* v. *United States*, 395 U.S. 285 (1969), affirming 288 F. Supp. 678 (D.D.C. 1968). See also *Coppedge* v. *Franklin County Board of Educ.*, 394 F.2d 410 (4th Cir. 1968), affirming 273 F. Supp. 289 (E.D.N.C. 1967); *Local 189, Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969); pp. 32-34 Brief Amicus Curiae for the National Education Association.

II.

The Assignment Plan Now in Effect Is Workable and Desegregates the Schools.

The school board urges here that the pupil assignment plan it offered to the district court on February 2, 1970, which has been rejected in every respect by both courts below, should have been approved. We have discussed at some length in our brief on the merits the court directed plan which is now in effect and the majority board plan.[7]

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[7] The board plan is actually the plan of five of the nine members of the board. Four members of the board offered an alternative plan for the complete desegregation of the system at the July, 1970 hearing. Judge McMillan found that plan acceptable, but the board chose to implement the plan which had been directed on February 5, 1970 (BR. A1 et seq.).

We respond here only to respondents' discussion in support of their plans for junior and senior high schools, matters not directly addressed by our brief on the merits.

The Junior High School Plan. The board's principal attack on the present assignment plan as ordered by the court is that it employs the technique of satellite zones while under the board plan all students would be assigned to a school within a zone which surrounds their school. The board therefore says that its plan maintains the "neighborhood school" concept. The court-ordered plan, it says, does not. We have previously demonstrated that the neighborhood school theory cannot be supported in history and tradition as a justification for continued segregation because it was widely and invariably disregarded in order to promote segregation.[8] Moreover, a comparison of the two plans shows that the board's arguments are entirely spurious.

At the junior high school level the court ordered plan draws zones around the twenty-one schools. In addition some smaller zones (satellites) are made in the black inner-city area which do not surround any schools. The black children in these zones are assigned to nine of the 21 junior high schools;[9] 12 of the schools have no satellites.[10] (See Respondents-Cross Petitioners' Brief Appendix, Map 7.) The board's plan includes no satellites. (See Respon-

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[8] See Brief for Petitioners, pp. 80-83. See also, Opinion and Order, April 23, 1969, 305a-306a.

[9] There are satellites for Eastway, Cochrane, Wilson, McClintlock, Albemarle Road, Carmel (sometimes referred to as P-600), Smith, Quail Hollow and Alexander Graham (sometimes referred to as "A.G.").

[10] The schools without satellites are: Alexander, Coulwood, Ranson, Northeast (sometimes referred to as J. H. Gunn, Wilgrove or P-601), Williams, Northwest, Spaugh, Kennedy, Sedgefield, Piedmont, Hawthorne and Randolph.

ents'-Cross-Petitioners' Brief Appendix, Map 6.) However, the board would leave 842 black children in Piedmont Junior High, a racially identifiable school (830a). This would nearly double the number of black students at Piedmont from the 1969-70 school year (Ibid). The board's justification for leaving a segregated black junior high school is its adherence to what it calls the neighborhood school concept. We suppose a neighborhood school means that the children who attend the same school are "neighbors." A close examination of the board's maps shows that the white and black children attending the junior high schools are as much "neighbors" under one plan as under the other.

The board zones are drawn so that there are corridors which lead into and include portions of the black community in order to integrate the formerly white schools.[11] Four of the five predominantly black schools were dealt with by extending the zones to include white areas. (Id. Map. No. 6)[11a] Five of the predominantly white schools under the board's plan would remain nearly all-white (830a).[12]

The court ordered plan, on the other hand, eliminates the board's corridors leading from black neighborhoods to white schools and simply assigns the black students to the outlying white schools. In fact, some of the same students residing within satellites of five of the schools would be assigned to the same school under the board plan.[13] Other black children were assigned from satellite

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[11] See, e.g., Coulwood, Ranson, Cochrane, Eastway, Wilson, Sedgefield, Smith and Randolph.

[11a] See, e.g., Hawthorne, Kennedy, Northwest, and Williams.

[12] Albemarle Road, McClintock, Quail Hollow and the two schools opened for the 1970-71 year, Carmel (P-600) and Northeast (referred to variously as J. H. Gunn, Wilgrove and P-601).

[13] Smith, Eastway, Cochrane, Wilson, and Alexander Graham (A.G.).

zones in the central city to predominantly white schools not desegregated by the board's plan. Under both plans black children are assigned to outlying schools and white children are assigned to formerly black inner-city schools. The principal difference in technique therefore between the plans is that the court ordered plan does not have connecting corridors between the white schools and the black areas. The principal difference in result is that court's plan is effective, complete and stable while the board's plan is limited, incomplete and is subject to the problems of resegregation.[14] We offer the following additional commitments about the board's connecting corridors and the administrative workability of the plans.

The board's connecting corridors bear no relationship to any conceivable neighborhood concept nor any relationship to any natural landmarks such as major thoroughfares. Therefore, the transportation system would be considerably more complex under the board's plan than under the plan adopted by the court. Judge McMillan emphasized this point in the Supplemental Findings of Fact of March 21, 1970:

> "Two schools may be used to illustrate this point. Smith Junior High under the board plan would have a contiguous district six miles in length extending 4½ miles north from the school itself. The district throughout the greater portion of its length is one-

[14] This is emphasized by the board's Interim Report on Desegregation, of September 23, 1970 (printed as an appendix herein, 10a-15a), which describes a developing problem of resegregation at Spaugh caused by new public housing projects. The board's limiting requirement that all students must reside within a zone surrounding a school would make it impossible to deal effectively with this situation caused by the policies and actions of governmental officials. By using the techniques of the court-ordered plan, the board can control the population at Spaugh so that it does not become a racially identifiable black school.

half mile wide and all roads in its one-half mile width are diagonal to its borders. Eastway Junior High presents a shape somewhat like a large wooden pistol with a fat handle surrounding the school off Central Avenue in East Charlotte and with a corridor extending three miles north and then extending at right angles four miles west to draw students from the Double Oaks area in northwest Charlotte. Obviously picking up students in narrow corridors along which no major road runs presents a considerable transportation problem.

The Finger plan makes no unnecessary effort to maintain contiguous districts, but simply provides for the sending of busses from compact inner city attendance zones, non-stop, to the outlying white junior high schools, thereby minimizing transportation tie-ups and making the pick-up and delivery of children efficient and time-saving. (1210a-1211a).

The district judge's finding was supported by the testimony of the court consultant[15] and the superintendent of schools:[16]

> Dr. Self, the school superintendent, and Dr. Finger, the court appointed expert, both testified that the transportation required to implement the plan for junior highs would be less expensive and easier to arrange than the transportation proposed under the board plan. The court finds this to be a fact. (1210a).

He concluded his analysis of the plan in the following way:

> In summary, as to junior high schools, the court finds that the plan chosen by the board and approved by the

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[15] 957a-958a.

[16] 803a-804a.

court places no greater logistic or personal burden upon students or administrators than the plan proposed by the school board; that the transportation called for by the approved plan is not substantially greater than the transportation called for by the board plan, that the approved plan will be more economical, efficient and cohesive and easier to administer and will fit in more nearly with the transportation problems involved in desegregating elementary and senior high schools, and that the board made a correct administrative and educational choice in choosing this plan instead of one of the other three methods (1211a-1210a).

The Senior High School Plan. The board also complains about the approval by the courts below of the satellite zone for Independence High School from which 300 black children are assigned to a school which would have had only 23 blacks enrolled under the board plan. Judge Butzner in approving this portion of the plan observed that:

> The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools (1273a).

He also noted that the non-stop bus trips for these students compares favorably in terms of distance with the transportation of other students assigned to Independence "and is substantially shorter than the systems average one-way trip of 17 miles" (1273a, n. 6).

The distance involved is also substantially equivalent to the distance to be traveled under the board's high school

plan by inner-city black students assigned to South Mecklenburg, East Mecklenburg, and West Mecklenburg and by which students are assigned to the formerly all-black West Charlotte School. (See Respondents-Cross-Petitioners' Brief Appendix, Map No. 8.)

Moreover, the children living within the Independence satellite zone would, under the board's plan, be assigned to Harding and West Mecklenburg high schools serving the area which the board reports is experiencing greater black enrollment than expected at the elementary and junior high school levels because of recently completed public housing.[17] If the 300 black children now going to Independence were, instead, going to Harding and West Mecklenburg, we would expect that the board would be reporting the anticipated resegregation at the high school level which they now expect at Spaugh Junior High School. Spaugh now has a 38.4% black enrollment. Under the board plan the combined enrollment at Harding and West Mecklenburg High Schools would be 39% black.[18] The combined enrollment is now only 31% black. Presumably the forces which the board expects to create resegregation at Spaugh Junior High School, if not corrected, including the anticipated early occupancy of 240 additional public housing units at Little Rock Homes would also have had the same effect upon Harding and West Mecklenburg High School if the district court had not required the assignments to Independence.

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[17] See appendix to this brief, 10a-15a.

[18] This figure is computed by adding 300 black students to the September 23, 1970 enrollments reported at Harding and West Mecklenburg.

III.

The School Board Proposes No Viable Rule of Law to Define the Goal of a Unitary System.

The board asks this Court to "give instruction and guidance to school boards" as to the requirements of a unitary school system. (Brief of Respondents p. 32; hereinafter referred to as "Brief") They offer, however, no standard or rule which would clarify the law.

The school board's position, as we understand it, is that the legal conclusions drawn by the Fourth Circuit are correct (*Id.* p. 36). The board supports the court's rule of reasonableness (*Ibid.*) which was stated as follows:

> "[S]chool boards must use all reasonable means to integrate the schools in their jurisdictions." (1267a)

The board does not seem to deny that it has some affirmative duty to desegregate.[19] Indeed, it quotes with approval

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[19] Respondents are not clear as to what they view as their minimal obligations to desegregate. They claim that "In formulating its plan, the Board to a very significant degree has elected to exceed Constitutional requirements" (Brief, p. 80). However, we do not understand them to adopt the position of several of the *amici* that a unitary system is created by engrafting upon a dual school system an ostensibly neutral geographic assignment plan, which leaves racial segregation intact. *Amicus Curiae* Brief for the Classroom Teachers Association of the Charlotte-Mecklenburg School System, Incorporated; *Amicus Curiae* Brief of the State of Florida; cf. *Amicus Curiae* Brief of William C. Cramer, *et al.* Such a position clearly conflicts, we think, with the decisions of this Court in *Brown* v. *Board of Education, supra; Green* v. *Country School Board of New Kent County*, 391 U.S. 430 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); *Raney* v. *Board of Education*, 391 U.S. 443 (1968); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969) and *Northcross* v. *Board of Education*, 397 U.S. 232 (1970). The other circuits are in agreement with the court below that a dual school

the conclusion of the court that smaller school districts are required to desegregate completely: "All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering or consolidating schools and transporting pupils." (1267a quoted at p. 36, Brief for Respondents).

In our brief on the merits we have criticized the "reasonable means" test (pp. 58-65) on the ground that it is a subjective standard which portends a new era of litigation and which sanctions a great deal of continuing segregation. The board's position underscores what we have said. They would have this Court adopt the rule of the Court of Appeals, but reject its application to the facts of this case. The board thus argues that its affirmative duty to eliminate the vestiges of segregation would be satisfied by its desegregation plan of February 2 (726a-748a) even though more than one-half of the black children would still be attending racially identifiable black schools because it says its plan employs all reasonable means. In concluding their brief, the board asserts that the means they have chosen are reasonable because their choices represent the "value judgments of the elected school board and the educators or its administrative staff" (*Id.*, at 100).

At bottom, the board is arguing that locally elected school boards must be vested with the discretion to determine not only the means but also the extent of desegrega-

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system is not dismantled by simply drawing zone lines which leave racial segregation in the schools undisturbed. See, e.g., *Henry* v. *Clarksdale Municipal Separate School District supra; Mannings* v. *Board of Public Instruction of Hillsborough County, supra; Ross* v. *Eckels, supra;* see analysis of Fifth Circuit's "Neighborhood School" concept in Brief for Petitioners *Davis* v. *Board of School Commissioners of Mobile County*, O.T. 1970, No. 436; *United States* v. *School District, 151 of Cook County, Illinois, supra; United States* v. *Board of Education, School District No. I, Tulsa, Okla.*, —— F.2d —— (10th Cir. 1970). We therefore do not address further the arguments of the above *amici*.

tion which is to occur within their jurisdictions. This plea for school board discretion is echoed in several *amicus curiae* briefs filed in this case. Brief for the Commonwealth of Virginia, *Amicus Curiae*, p. 27; Brief of the City of Chattanooga, Tenn., *Amicus Curiae*, p. 28; *Amicus Curiae* Brief of David E. Allgood, An Infant etc., *et al.*, p. 13.[20]

If the constitutional rights of black children to a desegregated school are to be left to the best judgments of local school boards, then, of course, many of the legal problems will be solved. A unitary school system would be whatever a local school board determines it to be. It would also, almost inevitably, be a segregated school system. Judge Sobeloff spoke to the matter of school board discretion in his dissent below:

> In making policy decisions that are not constitutionally dictated, state authorities are free to decide in their discretion that a proposed measure is worth the cost involved or that the cost is unreasonable, and accordingly they may adopt or reject the proposal. This is not such a case. Vindication of the plaintiffs' constitutional rights does not rest in the school board's discretion as the Supreme Court authoritatively decided sixteen years ago and has repeated with increasing emphasis (1288a).

The board offers no rule which would resolve the questions which it claims need answers,[21] other than its request that

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[20] Some of these amici seem also to argue for a "colorblind" test of the variety described in the preceding footnoote.

[21] The State of Florida, Governor Claude R. Kirk, Jr., The Commonwealth of Virginia, The Chattanooga Board of Education, the Concerned Citizens of Norfolk, Virginia and the Classroom Teachers Association of the Charlotte Mecklenburg School System, Inc., as *amici curiae*, join in respondents insistence that there are important questions to be answered. We perceive no viable answers in their

the discretionary decision of school boards be honored by the courts. We cannot believe that these crucial constitutional rights are to be left to a majority vote.

The school board offers no viable definition of a unitary school system. The Fourth Circuit's reasonable means test is "inherently ambiguous" (1289a) and is "a new litigable issue" which, as the board's brief makes clear would be "exploit[ed] . . . to the hilt." (1290a). Petitioners urge this Court to reject the reasonableness test either as announced in the court below or as would be further limited by the school board. The only thing certain about "reasonableness" as a standard in this context is that it sanctions a significant amount of continued segregation in the public schools.

Petitioners find no warrant in *Brown* or its progeny for any standard or test which at the outset assumes that segregation will remain. We submit that a dual school system must be required to reorganize so that *every* black child is to be free from assignment to a racially identifiable "black" school, at every grade of his education. The only exception to this general rule would be where eliminating all black schools is absolutely unworkable.[22] The plan or-

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submissions. They would either have the Court adopt a "color blind" standard which would leave segregation intact (see note, 20, supra, and accompanying text) or a rule placing great emphasis on school board discretion (see note 19, supra, and accompanying text.)

[22] See the concurring opinion of Mr. Justice Harlan in *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 292 (1970).

See also the dissenting opinion of Judge Sobeloff below:

> Of course it goes without saying that school boards are not obligated to do the impossible. Federal courts do not joust at windmills. Thus it is proper to ask whether a plan is feasible, whether it can be accomplished (1284a).

dered by the district court in this case accomplishes the goal[23] which we urge. And it works.[24]

IV.

The District Court Was Correct in Not Attempting to Declare a General Rule of Law to Govern the Multitude of Varied Circumstances of School Segregation in Other Cities and Other Parts of the United States.

The school board's brief suggests that Judge McMillan relied upon grounds to support his desegregation order which would apply to Chicago (or other large northern cities) as well as to Charlotte-Mecklenburg. The board thereby attempts to precipitate this Court into consideration of the enormously complicated problem that is sometimes termed "de facto" school segregation.[25] The Court is neither required nor able to consider that problem in this case.

Judge McMillan did not base his order on general principles applicable out of the context of classical school segregation under state segregation laws and practices—de jure segregation—nor, indeed, upon broad principles of

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[23] See Brief for Petitioner, *Davis* v. *Board of School Commissioners of Mobile County*, O. T. 1970, No. 436, pp. 63-49, for a full discussion of the general principle we ask this Court to announce.

[24] See Report, etc., which is printed as an Appendix to this Brief, 4a-9a (showing enrollment in the schools as of September 21, 1970).

[25] We think the labels "de facto" and "de jure" are somewhat unhelpful and confusing because the terminology tends to beg the question at issue, i.e., whether the government is responsible for the segregation to a sufficient extent that the Fourteenth Amendment prohibits its continuance. The terminology tends to assume that there is a distinction between the causes of segregated schools in the North as opposed to the South. That is a question which must in the final analysis be decided in the concrete circumstances of cases which present the issues.

ny sort applied out of the context of the particular school ystem of Charlotte. What Judge McMillan did, as he was legally and realistically obliged to do was to consider ll of the factors in the Charlotte situation that were relevant to determining whether the school board had fulfilled its obligations under *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and, if not, what steps were necessary to require it to fulfill those obligations.

That is also the only question before this Court. Nothing in this case obliges the Court to consider questions of so-called *de facto* segregation, for in this case we deal with an archetype of *de jure* segregation and a question of the proper remedies for it.

Prior to 1954, public schools in Charlotte-Mecklenburg were segregated pursuant to the state constitution and laws of North Carolina. Judge McMillan's opinion of August 3, 1970, attaches as an appendix the elaborate code of segregation laws adopted in North Carolina, including about sixty-five sections of the General Statutes and two sections of the Constitution. (This exhibit of the segregation laws has not been printed in the appendices, but is contained in the original record attached to the opinion of August 3, 1970.) Under this segregation code racial segregation of pupils and faculties and all aspects of the system was complete. A dual system of schools for whites and Negroes was maintained throughout the state under the compulsion of these laws. As Judge McMillan has noted many of these laws were still on the books in North Carolina when his April 23, 1969, opinion was written, although many were repealed thereafter by the 1969 General Assembly.

Although segregation in schools was unconstitutional from 1954 to 1970, as a practical and a legal matter, racial segregation has continued in the Charlotte-Mecklenburg

schools through the 1969-1970 school year. The board maintained until June 1969 a pupil assignment system based on geographic zones and freedom of transfer which was substantially the same as that held unconstitutional by this Court in *Monroe* v. *Board of Commissioners of Jackson, Tenn.*, 391 U.S. 450 (1968). Thus Judge McMillan found last year that the 9,216 pupils "in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision" (661a). Judge McMillan has been addressing a problem of how to desegregate all-black schools in Charlotte which remained in the pre-1954 pattern.

In determining whether the promise of *Brown I* that such segregation would be eliminated "root and branch" is applicable, Judge McMillan and this Court should properly give weight to the impact of all factors which operate within the school system of Charlotte-Mecklenburg to bring about its present condition or enable its change. It was for this reason that Judge McMillan considered—and we invite this Court to consider—such matters as housing demographic patterns effected by public housing, urban renewal, city zoning, racial restrictive covenants enforced by state laws, and by school planning decisions (school location, school size, grade structure, school attendance areas, etc.). All of these factors are related in determining the school system that Charlotte has today, and in appraising whether it meets the requirements of a desegregated system. Judge McMillan recognized, as this Court must, that the present system is the result of many factors. For example, decisions about whether to build schools, where to build schools, and the capacity of the schools to be built, shape neighborhood and demographic patterns over many years. Now that the schools have shaped the neighborhood, Judge McMillan reasonably took the view that a school system was not meeting its obligation to desegregate if it

now permitted the neighborhoods to shape the schools. The neighborhoods to which respondents advert as the basis of the "neighborhood school principle" are themselves the product of state planning and state action of many sorts, by the board of education and other state organs over many years. One can no more say that a neighborhood school principle in this setting achieves desegregation because it is "color blind" than one could sustain the operation of "color blind" Grandfather Clauses used by many states to perpetuate voting discrimination after this Court voided more obvious forms of denying black citizens the franchise. *Lane* v. *Wilson*, 307 U.S. 268 (1939).

But this does not mean that any of the factors considered by Judge McMillan here urged on this Court would have the same significance in another context, particularly with relation to a different question: for example, the question whether the City of Chicago has an unconstitutionally segregated school system in the first instance. This Court should be exceedingly cautious in indulging the assumption suggested by respondents that Chicago does pose the same —or indeed a different—problem than does Charlotte. We simply do not know, respondents do not know, and the Court does not know what problems Chicago may pose. One thing that the Court does know is that school desegregation problems are very complex, and arise against the full, complicated factual situations in different localities. What appears to be "de facto" in one context may be "de jure" in another. It is wholly inappropriate for the Court to decide this case in light of fears or concerns as to how problems in Chicago might be resolved, when there is not now a record before the Court suggesting either what the issues in Chicago might be or what the full set of complicated factual circumstances in Chicago, relevant to those issues, are.

V.

The Civil Rights Act of 1964 Does Not in Any Way Limit the Power of the Courts to Fashion Remedies for Unconstitutional Racial Segregation in Public Schools or Prohibit the Courts from Requiring Busing of Pupils to Disestablish Dual Segregated School Systems.

The school board and some of the *amicus curiae* have argued that two provisions of the Civil Rights Act of 1964—sections 401(b) and 407(a), codified as 42 U.S.C. §§2000c(b)[26] and 2000c-6(a)[27]—justify reversal of the dis-

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[26] §2000c. *Definitions*

As used in this subchapter—

* * *

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Pub.L. 88-352, Title IV, §401, July 2, 1964, 78 Stat. 246.

[27] §2000c-6. *Civil actions by the Attorney General—Complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants*

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are

trict court's desegregation plan. The board's brief argues that the Civil Rights Act of 1964 "expressly prohibits a United States Court to order transportation to achieve racial balance in schools" (School Board brief herein, Argument I.-E-4). This audacious effort to convert the Civil Rights Act into a sword against school desegregation has been rejected by every court of appeals which has been confronted with the argument, including the decision below by Judge Butzner (A. 1274a). See petitioners' brief herein at pp. 65-66 and cases cited. Judge Butzner concluded for the court below:

> Those provisions are not limitations on the power of school boards or courts to remedy unconstitutional segregation. They were designed to remove any implication that the Civil Rights Act conferred new jurisdiction on courts to deal with the question of whether

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unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

* * *

Pub.L. 88-352, Title IV, §407, July 2, 1964, 78 Stat. 248.

school boards were obligated to overcome *de facto* segregation (1274a).

The board's argument is entirely untenable because it is in conflict with the plain language of the Civil Rights Act and with the legislative purpose of the Congress.

The language of section 407(a) makes it clear that the relevant proviso was added merely to insure that the law was not interpreted to enlarge the powers of the federal courts. There is no language in the section which *prohibits* the courts from doing anything. Section 407 authorizes the attorney general to institute school segregation cases in the name of the United States in the federal courts upon receiving complaints of aggrieved citizens that they were "deprived by a school board of the equal protection of the laws." The section provides that the United States may sue "for such relief as may be appropriate" and that the appropriate district courts "shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section." Immediately after this grant of jurisdiction over suits brought by the attorney general, section 402 states the proviso that the board relies on, which says that nothing therein empowers any official or court of the United States "to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one such school district to another in order to achieve such racial balance, *or otherwise enlarge* the existing power of the court to insure compliance with constitutional standards" (emphasis added).

There is simply nothing in this language that prohibits the federal courts from doing anything. It certainly does not forbid anything the courts find necessary to "insure compliance with constitutional standards" (section 407).

The whole purpose of §407 is to enable the federal government to institute suits to "further the orderly achievement of desegregation in public education" by enforcing the Equal Protection Clause through suits in the federal courts.

The proviso applies only to suits instituted pursuant to the section—that is, where the federal courts exercise the jurisdiction conferred to entertain school desegregation cases instituted by the attorney general. The provision has no application whatsoever to this Charlotte school case which was not instituted by the attorney general but was filed by petitioners who invoked the district court's jurisdiction under 28 U.S.C. §1343 to enforce their rights under 42 U.S.C. §1983 and the Fourteenth Amendment. The United States is not even a party to this case. Section 409 of the Act (42 U.S.C. §2000c-8) provides that "Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education or in any facility covered by this title." Thus, the Congress made plain that any limitation placed on suits brought by the attorney general would not "adversely affect" suits brought by private litigants.

But even assuming arguendo that the section does apply to suits initiated by private citizens seeking desegregation, there is nothing in the language or in the legislative history which suggests that it was the purpose of the Congress to restrict the power of the federal courts in deciding constitutional issues in school desegregation controversies. On the contrary, Senator Humphrey, the manager of the bill in the Senate (where the provision originated), explained its purpose quite clearly. His statement dispels any possibility of ambiguity about the purposes of the proponents of the provision:

> Mr. Humphrey. Mr. President, this matter requires a statement. Therefore, I take this time to state, for

the proponents of the bill, that the language of title IV which provides that nothing in the title shall empower any Federal court or official to issue an order requiring the transportation of school children to correct racial imbalance in the schools has been the subject of considerable discussion. This provision of title IV recognizes that the problems of racial imbalance and school transportation are presently the subjects of considerable court consideration and local administrative action, as well as a great deal of discussion, often heated, among parents and educators. In some instances, courts have decided that racial imbalances may constitute a denial of equal protection of the laws. *Balaban* v. *Rubin,* 32 U.S. L.W. 2465; *Blocker* v. *Board of Education,* 32 U.S. L.W. 2465; *Jackson* v. *Pasadena School Board,* 382 F.2d 878. On the other hand, relief has been denied on the grounds that school racial imbalance resulting from de facto segregation is not per se unconstitutional. *Bell* v. *City of Gary,* 324 F.2d 309, certiorari denied, 32 U.S. L.W. 3384. Some communities are attempting to correct racial imbalances by the transporting of children; others refuse to do so. The purpose of the pending Dirksen-Mansfield-Humphrey-Kuchel substitute is to make clear that the resolution of these problems is to be left where it is now, namely, in the hands of local school officials and the courts. This bill is made neutral on the resolution of these problems by the language of title IV. It is to be used as the vehicle to require transportation to correct racial imbalances; it is not to be used as an excuse for local officials to refuse to carry out their obligations. Obviously this provision could not affect a court's determination concerning racial imbalance and possible corrective measures; this is dependent upon the court's interpretation of the 14th amendment.

As floor manager of this legislation, I wish to note
e intention of those who sought to deal with the vex-
g problem of de facto segregation through the lan-
uage contained in Dirksen substitute amendment.

s it is entirely clear that the Congress intended to
utral on the question whether racial imbalances vi-
l the Fourteenth Amendment and to leave that and
d questions about transportation for the courts to
e in interpreting the Constitution. We have studied
ntire legislative history of the provision, including all
natters cited by the board and the amici curiae, and
nd that quite simply there is nothing which indicates
the Congress sought to limit the power of the federal
ts to interpret the Constitution and apply the doctrine
rown v. *Board of Education*, 347 U.S. 483 (1954). The
artment of Justice reached the same conclusion in a
iled memorandum filed in November 1969 in fourteen
ol cases submitted before the Fifth Circuit sitting *en*
c. We quote at length from the Justice Department
ly of the legislative history in the margin below.[22]

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[22] See Memorandum of the United States filed in *Singleton* v. *kson Municipal Separate School District*, 5th Cir., No. 26285 d other en banc school cases), 419 F.2d 1211 (5th Cir. 1969), ersed as to desegregation delay *sub nom. Carter* v. *West Felici- Parish School Board*, 396 U.S. 290 (1970). The following mmary appears at pp. 5-8 of that Memorandum:

"Summary

"The meaning of the proviso in section 407(a) regarding transportation and of the qualifying language in section 401(b) depends upon the phrase 'racial imbalance.' The latter phrase was used, in a different context, in the original version of H.R. 7152, the bill which became the Civil Rights Act of 1964. The bill as introduced provided that the Commissioner of Education could award grants and render technical assistance to (1) school districts undergoing desegregation and (2) districts faced with problems of racial imbalance. The authority of the

Lengthy discussions in some of the amicus briefs about what Congress meant by the statutory term "racial balance" are essentially beside the point because—whatever that phrase may mean—Congress has not *prohibited* the courts from doing anything with respect to "racial balance."

There is even less reason to think that section 401(b) has anything to do with this case. The definition of "de-

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Attorney General to initiate lawsuits was limited to actions to achieve desegregation.

"During hearings on the bill before a House subcommittee, the term 'racial imbalance' was equated with de facto segregation, the situation existing in a city where, solely because of residential patterns, certain schools were attended largely by members of one race. Some members of the subcommittee expressed opposition to Federal action with regard to de facto segregation. The bill as reported by the House Judiciary Committee deleted the references to 'racial imbalance.' Thus, both the authority of Commissioner of Education to render assistance and the authority of the Attorney General to bring suit were limited to desegregation.

"Despite the removal of references to 'racial imbalance,' Congressman Cramer offered and the House adopted an amendment adding to the definition of 'desegregation' in section 401(b) the statement that '"desegregation" shall not mean the assignment of students . . . in order to overcome racial imbalance.' Congressman Cramer wished to make clear that Title IV was not to apply to de facto segregation. The purpose of Title IV was to implement the Fourteenth Amendment.

"In the Senate, as in the House, the proponents of the bill stated that Title IV was intended to reach unconstitutional state action and that it would not affect racial imbalance in schools which resulted exclusively from housing patterns. The compromise bill offered in the Senate, which was ultimately enacted, added to section 407(a) the proviso concerning 'racial balance.' The purpose of the change was to reemphasize that the Congress was not authorizing Federal intervention, e.g., requiring busing, with respect to school systems which were in compliance with the Fourteenth Amendment.

"Senator Humphrey, the floor manager for the bill, and other members of Congress expressly recognized that the provisions of Title IV would not affect judicial construction of the Fourteenth Amendment.

segregation" in section 401(b) provides a meaning for the term "as used in this title"—or in the code: "as used in this subchapter." The reference is to Title IV of the Act which, in addition to authorizing suits by the attorney general (as indicated above in the discussion of section 407), does nothing else except authorizing activities of the Commissioner of Education: to conduct a survey and make a report on the lack of educational opportunities (section 402), to grant technical assistance to school boards and other units implementing "desegregation" of public schools (section 403), to conduct training institutes (section 404), and to make financial grants to school boards for dealing with desegregation problems (section 405). Thus the definition of desegregation in Title IV has only to do with suits by the attorney general (and he is authorized to enforce the equal protection guarantee) and the activities of the Commissioner of Education. None of this has anything to do with this lawsuit by private citizens—pupils and parents—filed in a district court pursuant to the civil rights jurisdiction of the district courts to enforce their rights under the Fourteenth Amendment. There was no effort by the Congress to define the meaning of the Equal Protection Clause in section 401(b), and nothing in the Act indicates that any such thing was intended.[29]

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[29] Congressman Cramer, who sponsored an amendment adding the last clause in section 401(b), proposed the idea on the House floor on February 1, 1964 (110 Cong. Rec. 1598), stating he favored putting "something specific in it [the bill] saying that it is not the intention of Congress to include racial imbalance or de facto segregation. I think we should consider an amendment to that effect." The amendment was offered and agreed to February 6, 1964 (110 Cong. Rec. 2280), following Mr. Cramer's assertion that its purpose was merely "to strike 'racial imbalance' from the bill and from this title which I otherwise, in its present form, believe is still in the bill as I have said before many times." He said:

> "The purpose is to prevent any semblance of congressional acceptance or approval *of the concept of 'de facto' segregation* or to include in the definition of 'desegregation' any balancing of school attendance by moving students across school district

In addition, of course, there is no prohibitory language of any kind in section 401. It defines desegregation but does not attempt to limit—or even refer—the federal courts to that definition. There is nothing in Title IV (or elsewhere in the Act) indicating that the definition is to have any force at all in the courts. Nor is there any legislative history suggesting that the definition related to the courts' powers.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina 28202

C. O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina 27702

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

Attorneys for Petitioners and Cross-Respondents

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lines to level off percentages where one race outweighs another" (110 Cong. Rec. 2280) (emphasis added).

Mr. Cramer's brief in this Court distorts this simple history by editing the above quoted remarks to delete—with ellipses—the matter which we have italicized in the last quoted speech. Amicus Curiae Brief of William C. Cramer, in this case, p. 13. Mr. Cramer's brief now asserts that his amendment was not concerned with the problem of racial balance in de facto areas but with his own constituency. Brief of Mr. Cramer, p. 22. It would seem that Mr. Cramer's style of argument is rather disingenuous, both on the House floor and in his brief in this Court.

APPENDIX

In the

United States District Court

For the Western District of North Carolina

Charlotte Division

Civil Action No. 1974

James E. Swann, *et al.*,

Plaintiffs,

vs.

Charlotte-Mecklenburg Board of Education, *et al.*,

Defendants.

Interim Report on Desegregation, September 23, 1970

In accordance with the prior filing by the defendants herein, the Charlotte-Mecklenburg Board of Education furnishes the following information to the Court:

1. Transportation has posed the greatest impediment to opening of schools on a full day schedule. The system has received from the State of North Carolina 185 buses, of which 35 have been renovated and now permit the system to operate a total of 398 school buses. In addition, 39 city transit and nine Trailways buses are operating so that 71 schools may operate on a full-day basis by staggering opening and closings and 32 schools are operating on a part-day schedule, two hours in the afternoon. School openings range from 7:30 a.m. to 1:00 p.m. The condition of the buses loaned through the offices of the State Board of Education are not in as good condition as represented, thereby impeding the ability of the system to put them into service.

Arrangements have been made for 17 buses to be repaired by other school districts.

By the end of this week, it is expected that 82 of the 103 schools will be on full-day schedules, though their opening and closing hours will be staggered. An additional 21 schools will await satisfactory transportation arrangements. Efforts are being made to involve parents in car pools so that these schools may open on a full-time basis.

2. The attachment designated Exhibit 1 reflects the anticipated membership, actual membership or enrollment and actual attendance by race on September 21, 1970, for junior and senior high schools.

3. The attachment designated Exhibit 2 reflects the anticipated membership, actual membership or enrollment and actual attendance by race on September 21, 1970, for elementary schools.

4. Attached marked Exhibit 3 is a report on the distribution of professional staff by school and race as of September 21, 1970.

5. With respect to elementary schools, it is noted that as a result of movement of residents, three elementary schools, Barringer, Berryhill and Amay James, now house a predominantly black student body. The Board of Education instructed the staff to review the racial condition of these schools and make recommendations. Attached marked Exhibit 4 is a copy of the report of the staff to the Board of Education. No action has been taken with reference to this report.

6. Attached marked Exhibit 5 the court will find an elementary attendance map on which the new housing developments have been located within the various attendance districts.

nterim Report on Desegregation, September 23, 1970

. The change of the residential neighborhood gives rise possible problems in the Spaugh Junior High School endance district because of rapid changes occuring with- the district. At the direction of the Board, the staff udied this condition and presented its report, a copy of hich is attached, marked Exhibit 6. No action has been ken with reference to this report.

Respectfully submitted this 23rd day of September, 1970.

/s/ William J. Waggoner
William J. Waggoner
Weinstein, Waggoner, Sturges,
Odom and Bigger
1100 Barringer Office Tower
Charlotte, North Carolina

/s/ Benjamin S. Horack
Benjamin S. Horack
Ervin, Horack and McCartha
806 East Trade Street
Charlotte, North Carolina

Attorneys for Defendants

Exhibit 1 Attached to Interim Report

(See Opposite) ☞

CHARLOTTE - MECKLENBURG SECONDARY SCHOOLS

REPORT OF MEMBERSHIP AND ATTENDANCE

JUNIOR HIGH SCHOOLS

SCHOOL	ANTICIPATED MEMBERSHIP	ACTUAL MEMBERSHIP 9 - 21 - 70					ACTUAL ATTENDANCE 9 - 21 - 70				
		B	W	T	%	%B	B	W	T	%	%B
Albemarle Rd.	1134	330	762	1092	96.2	30.2	289	727	1016	89.5	29.3
Alexander	1041	317	720	1037	99.6	30.5	290	671	961	92.3	30.1
Carmel	634	186	464	650	102.5	28.6	158	439	597	94.1	26.4
Cochrane	1291	336	945	1281	99.2	26.2	300	915	1215	94.1	24.6
Coulwood	783	233	555	788	100.6	29.5	225	527	752	96.0	29.9
Eastway	1168	361	793	1154	98.8	31.2	327	764	1091	93.4	29.9
Alexander-Graham	1076	272	707	979	90.9	27.7	241	680	921	85.5	26.1
Hawthorne	988	339	563	902	91.2	37.5	312	498	810	81.9	38.5
Kennedy	842	206	545	751	89.1	27.4	199	481	680	80.7	29.2
McClintock	1326	316	964	1280	96.5	24.6	287	940	1227	92.5	23.3
Northeast	612	51	562	613	100.1	8.3	50	524	574	93.7	8.7
Northwest	1161	433	521	954	82.1	45.3	408	474	882	75.9	46.2
Piedmont	693	153	518	671	96.8	22.8	130	446	576	83.1	22.5
Quail Hollow	1481	383	1138	1521	102.7	25.1	343	1101	1444	97.5	23.7
Randolph	1023	253	731	984	96.1	25.7	242	700	942	92.0	25.6
Ranson	810	273	568	841	103.8	32.4	266	532	798	98.5	33.3
Sedgefield	1031	304	718	1022	99.1	29.7	265	668	933	90.4	28.4
Smith	1304	422	893	1315	100.8	32.0	385	862	1247	95.6	30.8
Spaugh	1110	440	715	1155	104.0	38.0	404	602	1006	90.6	40.1
Williams	1038	307	641	948	91.3	32.3	294	613	907	87.3	32.1
Wilson	854	320	611	931	109.0	34.3	281	583	864	101.1	32.5
TOTAL	21,400	6,235	14,634	20,869	97.5	29.8	5,696	13,747	19,443	90.8	29.2

SENIOR HIGH SCHOOLS

East Mecklenburg	2097	505	1603	2108	100.5	23.9	469	1512	1981	94.4	23.6
Garinger	2344	648	1716	2364	100.8	27.4	588	1585	2173	92.7	27.0
Harding	1107	343	710	1053	95.1	32.5	298	631	929	83.9	32.0
Independence	1672	345	1273	1618	96.7	21.3	265	1219	1484	88.7	17.8
Myers Park	2303	495	1782	2277	98.8	21.7	448	1705	2153	93.4	20.8
North Mecklenburg	1461	417	936	1353	92.6	30.8	378	867	1245	85.2	30.3
Olympic	1283	284	1021	1305	101.7	21.7	251	959	1210	94.3	20.7
South Mecklenburg	2200	493	1585	2078	94.4	23.7	434	1497	1931	87.7	22.4
West Charlotte	1769	606	845	1451	82.0	41.7	588	753	1341	75.8	43.8
West Mecklenburg	1529	467	1075	1542	100.8	30.2	423	984	1407	92.0	30.0
TOTAL	17,764	4,603	12,546	17,149	96.5	26.8	4,142	11,712	15,854	89.2	26.1

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Report of Membership and Attendance

School	Antic. Mem.	9-21-70 Actual Membership B	W	T	%	%B	9-21-70 Actual Attendance B	W	T	%	%B
Albemarle Road	486	154	358	512	105.3	30.1	135	323	458	94.2	29.5
Allenbrook	519	142	355	497	95.8	28.6	130	346	476	91.7	27.3
Ashley Park	571	228	359	587	102.8	38.8	221	358	579	101.4	38.2
Bain	780	22	733	755	96.8	2.9	22	699	721	92.4	3.05
Barringer	527	290	235	525	100.4	55.2	286	220	506	96.0	56.5
Berryhill	866	688	386	1074	80.6	64.1	640	352	992	114.5	64.5
Beverly Woods	605	172	413	585	96.7	29.4	151	400	551	91.1	27.4
Billingsville	383	125	289	414	108.1	30.2	123	268	391	102.1	31.5
Briarwood	670	219	450	669	99.9	32.7	202	426	628	93.7	32.2
Bruns Avenue	762	251	413	664	87.1	37.8	236	383	619	81.2	38.1
Chantilly	445	122	334	456	102.5	26.8	116	319	435	97.8	26.7
Clear Creek	306	66	269	335	109.5	19.7	64	255	319	104.2	20.1
Collinswood	717	321	421	742	103.5	43.3	312	407	719	100.3	43.4
Cornelius	442	154	304	458	103.6	33.6	149	291	440	99.5	33.9
Cotswold	522	124	417	541	103.6	22.9	123	404	527	100.9	23.3
Davidson	247	112	147	259	104.9	43.2	108	144	252	102.0	42.9
Marie Davis	668	189	422	611	91.5	30.9	177	403	580	86.8	30.5
Derita	813	157	640	797	98.0	19.7	150	612	762	93.7	19.7
Devonshire	853	259	607	866	101.5	29.9	247	571	818	95.9	30.2
Dilworth	447	160	369	529	118.3	30.2	153	347	500	111.8	30.6
Double Oaks	705	194	372	566	80.3	34.3	188	357	545	77.3	34.5
Druid Hills	444	150	265	415	93.5	36.1	146	257	403	90.8	36.2
Eastover	514	120	371	491	95.5	24.4	107	367	474	92.2	22.6
Elizabeth	627	181	394	575	91.7	31.4	173	374	547	87.2	31.6
Enderly Park	451	256	276	532	117.9	48.1	229	251	480	106.4	47.7

Report of Membership and Attendance

School	Antic. Mem.	9-21-70 Actual Membership B	W	T	%	%B	9-21-70 Actual Attendance B	W	T	%	%B
First Ward	778	226	435	661	84.9	34.1	187	402	589	75.7	31.7
Hickory Grove	560	203	356	559	99.8	36.3	191	337	528	94.3	36.2
Hidden Valley	928	271	617	888	95.6	30.5	258	603	861	106.4	29.96
Highland	426	138	291	429	100.7	32.1	127	278	405	95.1	31.4
Hoskins	263	113	165	278	105.7	40.6	108	160	268	96.5	40.3
Huntersville	687	150	521	671	97.6	22.3	147	501	648	94.3	22.7
Huntingtowne Farms	574	191	380	571	99.4	33.4	183	371	554	96.5	33.0
Idlewild	671	167	455	622	92.6	26.8	149	439	588	87.6	25.3
Amay James	320	449	99	548	171.2	81.9	416	80	496	155.0	83.9
Lakeview	400	114	253	367	91.7	31.0	103	238	341	85.3	30.2
Lansdowne	669	274	468	742	110.9	36.9	229	443	672	100.4	34.1
Lincoln Heights	727	189	402	591	81.2	31.9	183	382	565	77.7	32.4
Long Creek	821	325	505	830	101.0	39.1	320	481	801	97.6	39.95
Matthews	878	92	837	929	105.8	9.9	86	808	894	101.8	9.6
Merry Oaks	445	116	316	432	97.0	26.8	112	305	417	93.7	26.9
Midwood	558	103	431	534	95.6	19.2	98	399	497	89.0	19.7
Montclaire	603	164	421	585	97.0	28.0	164	421	585	97.0	28.0
Myers Park Elem.	538	144	378	522	97.0	27.5	128	367	495	92.0	25.6
Nations Ford	889	212	725	937	105.3	22.6	200	673	873	98.2	22.9
Newell	608	62	544	606	99.6	10.2	57	515	572	94.1	10.0
Oakdale	680	171	505	676	99.4	25.2	170	477	647	95.1	26.3
Oakhurst	698	253	537	790	113.1	32.0	194	516	710	101.7	27.3
Oaklawn	595	180	296	476	80.0	37.8	175	290	465	78.2	37.6
Olde Providence	540	91	365	456	84.4	19.5	85	353	438	81.1	19.4
Park Road	530	158	357	515	97.1	30.6	145	330	475	89.6	30.5

Report of Membership and Attendance

School	Antic. Mem.	9-21-70 Actual Membership B	W	T	%	%B	9-21-70 Actual Attendance B	W	T	%	%B
Paw Creek	578	104	362	466	80.6	22.3	95	352	447	77.3	21.2
Paw Creek Annex	345	97	220	317	91.8	30.5	95	216	311	90.1	30.5
Pineville	527	136	365	501	95.0	27.1	136	365	501	95.1	27.1
Pinewood	837	243	525	768	91.7	31.6	233	504	737	88.1	31.6
Plaza Road	521	142	359	501	96.1	28.3	136	329	465	89.3	29.2
Rama Road	746	277	490	767	102.8	36.1	277	483	760	101.9	36.4
Sedgefield Elem.	637	205	406	611	95.9	33.5	192	390	582	91.4	32.9
Selwyn	505	182	340	522	103.3	34.8	173	338	511	101.2	33.8
Shamrock Gardens	485	98	390	488	100.6	20.0	93	376	469	96.7	19.8
Sharon	295	96	186	282	95.5	34.0	91	180	271	91.9	33.5
Starmount	659	207	446	653	99.0	31.6	181	430	611	92.7	29.6
Statesville Road	691	180	496	676	97.8	26.6	176	473	649	93.9	21.7
Steele Creek	607	244	396	640	105.4	38.1	226	383	609	100.3	37.1
Thomasboro	664	176	478	654	98.4	26.9	163	466	629	94.7	25.9
Tryon Hills	510	244	286	530	103.9	46.0	226	268	494	96.9	45.7
Tuckaseegee	594	181	376	557	93.7	32.4	177	361	538	90.6	32.8
University Park	759	259	355	614	80.8	42.1	251	331	582	76.7	43.1
Villa Heights	751	234	476	710	94.5	32.9	196	444	640	85.2	30.6
Westerly Hills	644	235	401	636	98.7	36.9	220	389	609	94.6	36.1
Wilmore	398	197	213	410	103.0	48.0	186	198	384	96.5	48.4
Windsor Park	733	188	517	705	96.1	26.6	176	503	679	92.6	25.9
Winterfield	695	239	482	721	103.7	33.1	208	459	667	95.9	31.1
Total	42,937	13,576	28,823	42,399	98.7	32.0	12,710	27,541	40,251	93.7	31.8

DISTRIBUTION OF PROFESSIONAL STAFF
September 21, 1970

	Black	White	Total	Per Cent Black
Elementary Schools	482	1318	1800	26.7
Junior High Schools	229	707	936	24.4
Senior High Schools	190	684	874	21.7
TOTAL STAFFING FULLY ASSIGNED TO SCHOOLS GRADES 1-12	901	2709	3610	24.9

DISTRIBUTION OF PROFESSIONAL STAFF
September 21, 1970

Elementary School	Black	White	Total	Per Cent Black
Albemarle Road	5	16	21	23.8
Allenbrook	6	16	22	27.2
Ashley Park	5	19	24	20.8
Bain	8	24	32	25.0
Barringer	7	15	22	31.8
Berryhill	9	27	36	25.0
Beverly Woods	6	18	24	25.0
Billingsville	6	16	22	27.2
Briarwood	7	20	27	25.9
Bruns Avenue	10	20	30	33.3
Chantilly	5	15	20	25.0
Clear Creek	4	13	17	23.5
Collinswood	6	21	27	22.2
Cornelius	5	13	18	27.7
Cotswold	5	16	21	23.8
Davidson	3	9	12	25.0
Marie Davis	11	20	31	35.4
Derita	8	26	34	23.5
Devonshire	10	24	34	29.4
Dilworth	6	21	27	22.2
Double Oaks	8	17	25	32.0
Druid Hills	5	13	18	27.7
Eastover	7	18	25	28.0
Elizabeth	8	17	25	32.0

Elementary School	Black	White	Total	Per Cent Black
Enderly Park	5	15	20	25.0
First Ward	10	20	30	33.3
Hickory Grove	6	17	23	26.0
Hidden Valley	10	28	38	26.3
Highland	4	14	18	22.2
Hoskins	3	10	13	23.0
Huntersville	7	19	26	26.9
Huntingtowne Farms	5	18	23	21.7
Idlewild	7	22	29	24.1
Amay James	6	15	21	28.5
Lakeview	6	14	20	30.0
Lansdowne	7	22	29	24.1
Lincoln Heights	7	19	26	26.9
Long Creek	8	23	31	25.8
Matthews	10	28	38	26.3
Merry Oaks	5	13	18	27.7
Midwood	6	18	24	25.0
Montclaire	7	19	26	26.9
Myers Park	6	19	25	24.0
Nations Ford	8	25	33	24.2
Newell	6	20	26	23.0
Oakdale	7	20	27	25.9
Oakhurst	6	20	26	23.0
Oaklawn	8	17	25	32.0
Olde Providence	6	18	24	25.0

Elementary School	Black	White	Total	Per Cent Black
Park Road	6	18	24	25.0
Paw Creek	6	17	23	26.0
Paw Creek Annex	3	9	12	25.0
Pineville	6	17	23	26.0
Pinewood	10	23	33	30.3
Plaza Road	6	17	23	26.0
Rama Road	6	22	28	21.4
Sedgefield	7	20	27	25.9
Selwyn	5	17	22	22.7
Shamrock Gardens	5	14	19	26.3
Sharon	5	10	15	33.3
Starmount	7	20	27	25.9
Statesville Road	9	18	27	33.3
Steele Creek	6	19	25	24.0
Thomasboro	7	20	27	25.9
Tryon Hills	6	16	22	27.2
Tuckaseegee	6	19	25	24.0
University Park	10	16	26	38.4
Villa Heights	12	20	32	37.5
Westerly Hills	7	19	26	26.9
Wilmore	5	14	19	26.3
Windsor Park	9	23	32	28.1
Winterfield	7	23	30	23.3
Total	482	1318	1800	26.7

DISTRIBUTION OF PROFESSIONAL STAFF
September 21, 1970

Junior High School	Black	White	Total	Per Cent Black
Albemarle Road	12	41	53	22.6
Alexander	8	35	43	18.6
Carmel	8	20	28	28.5
Cochrane	14	43	57	24.5
Coulwood	7	28	35	20.0
Eastway	13	40	53	24.5
Alexander Graham	12	34	46	26.0
Hawthorne	12	30	42	28.5
Kennedy	9	29	38	23.6
McClintock	14	42	56	25.0
Northeast	7	22	29	24.1
Northwest	13	35	48	27.0
Piedmont	9	24	33	27.2
Quail Hollow	14	50	64	21.8
Randolph	11	35	46	23.9
Ranson	10	26	36	27.7
Sedgefield	11	33	44	25.0
Smith	13	41	54	24.0
Spaugh	11	36	47	23.4
Williams	12	33	45	26.6
Wilson	9	30	39	23.0
Total	229	707	936	24.4

DISTRIBUTION OF PROFESSIONAL STAFF
September 21, 1970

Senior High School	Black	White	Total	Per Cent Black
East Mecklenburg	20	82	102	19.6
Garinger	26	87	113	23.0
Harding	13	50.5	63.5	20.4
Independence	22	63	85	25.8
Myers Park	23	83	106	21.6
North Mecklenburg	15	56	71	21.1
Olympic	15	49.5	64.5	23.2
South Mecklenburg	20	81	101	19.8
West Charlotte	22	66	88	25.0
West Mecklenburg	14	66	80	17.5
Total	190	684	874	21.7

Exhibit 4 Attached to Interim Report

(See Opposite) ☞

Charlotte-Mecklenburg Elementary Schools

AN ANALYSIS OF ENROLLMENT AND HOUSING PROBLEMS

September 21, 1970

The Problem:

The enrollments of three elementary schools in the western section of the county are turning out to be majority black. There is a strong possibility that the schools will become totally black unless some preventive measures are taken. The anticipated enrollment for the three schools in question are as follows:

	Black	White	Total	Capacity	% Black
Barringer	296	262	558	513	53
Berryhill	640	441	1081	810	59
Amay James	458	133	591	405	77

The Cause:

Majority black enrollment in these three schools is the result of changing neighborhoods and the location of three public housing projects in the area. The projects are:

Dalton Village	1 Bedroom	40 Units
	2 Bedrooms	75 "
	3 "	93 "
	4 "	72 "
	5 "	20 "
		300 Units
Boulevard Homes	1 Bedroom	40 Units
	2 Bedrooms	74 "
	3 "	98 "
	4 "	68 "
	5 "	20 "
		300 Units
Little Rock Homes	1 Bedroom	15 Units
	2 Bedrooms	90 "
	3 "	95 "
	4 "	20 "
	5 "	20 "
		240 Units

Both Dalton Village and Boulevard Homes are completed. Both are 75% occupied now. One hundred percent occupancy is anticipated by November 1, 1970.

Ninety units of Little Rock Homes are scheduled to be completed by December 31, 1970. Completion date for the remaining 150 units is scheduled for February 1, 1971.

Dalton Village is located in the Amay James attendance area. As of September 16, 1970, 329 children had been enrolled at Amay James from the project. Enrollment by grade was: Grade 1 - 57, Grade 2 - 61, Grade 3 - 63, Grade 4 - 50, Grade 5 - 53, and Grade 6 - 45.

Boulevard Homes and Little Rock Homes are both located in the Berryhill district. As of September 16, 1970, 358 children had enrolled at Berryhill School from Boulevard Homes. None have been registered from Little Rock Homes. Enrollment by grades from Boulevard Homes was: Grade 1 - 74, Grade 2 - 72, Grade 3 - 53, Grade 4 - 59, Grade 5 - 56, and Grade 6 - 44.

In addition to the three public housing projects, a large private housing project is located in the area in the Steele Creek district. This development, named Roseland 1 and 2, contains 504 units, all of which are completed. The sizes of the 504 units are as follows: one bedroom - 176 units, two bedrooms - 224 units, three bedrooms - 104 units. A representative of the owner indicated that 50% of the units were occupied at this time. As of September 16, 1970, 81 had enrolled at Steele Creek from Roseland 1 and 2.

Several small private housing projects are located in the Barringer district. One such project, Keyway, located on Malden Street, has just been completed. The project contains 56 units. One hundred and three pupils from this project have enrolled at Barringer.

The Parker Heights housing project off Remount Road is located in the Ashley Park attendance area. Parker Heights contains 100 units. Thirty pupils from this project attend Ashley Park.

Information on Housing Projects
September 17, 1970

Project	School Attendance Area	No. Units	No. Completed 9-15-70	Completion Date	Per Cent Occupancy	No. Pupils
Dalton Village	Amay James	300	300		75	* 329
Boulevard Homes	Berryhill	300	300		75	* 358
Little Rock Homes	Berryhill	240	-0-	90-12/31/70 150-2/1/71	-0-	-0-
Roseland (1 & 2)	Steele Creek	504	504		50	81
Keyway	Barringer	56	56		100	*103
Parker Heights	Ashley Park	100	100		100	30

* Reports from school principals indicate by September 21 the almost totally occupied count of number of pupils:

Dalton Village	340
Boulevard Homes	419
Keyway	123

The Alternatives

If it is determined that preventive measures need to be taken in order to relieve the situation, several alternatives should be considered.

1a To relieve overcrowding at Berryhill, reassign elementary students as follows:

(a) 140 pupils from Thomasboro's downtown satellite district to Clear Creek.

(b) 240 pupils from Berryhill's Boulevard Homes district to Thomasboro.

(c) Another 179 pupils: 47 each to Allenbrook 1-5 and Tuckaseegee 1-5; 60 to Paw Creek (1-4) and 25 to Druid Hills (Gr 6).

As a result of these moves the following enrollment pattern would be established:

	W	B	T	%B
Clear Creek	246	203	449	45
Thomasboro	525	259	784	33
Allenbrook	379	206	584	35
Druid Hills	301	177	478	37
Paw Creek	434	194	628	31
Tuckaseegee	428	238	666	36
Berryhill	441	244	685	36

1b To relieve overcrowding at Amay James redraw the Nations Ford attendance line so as to include 280 of Dalton Village; and, satellite 60 pupils to Shamrock Gardens from the remainder of Dalton Village.

As a result of this move the following enrollment pattern would be established:

	W	B	T	%B
Shamrock Gardens	381	164	525	31
Nations Ford	674	495	1169	42
Amay James	133	118	251	47

This move would transfer an additional 280 pupils to Nations Ford. These pupils would be accommodated by using mobile units at Nations Ford or by using portions of Sterling Child Development Center. (8 rooms).

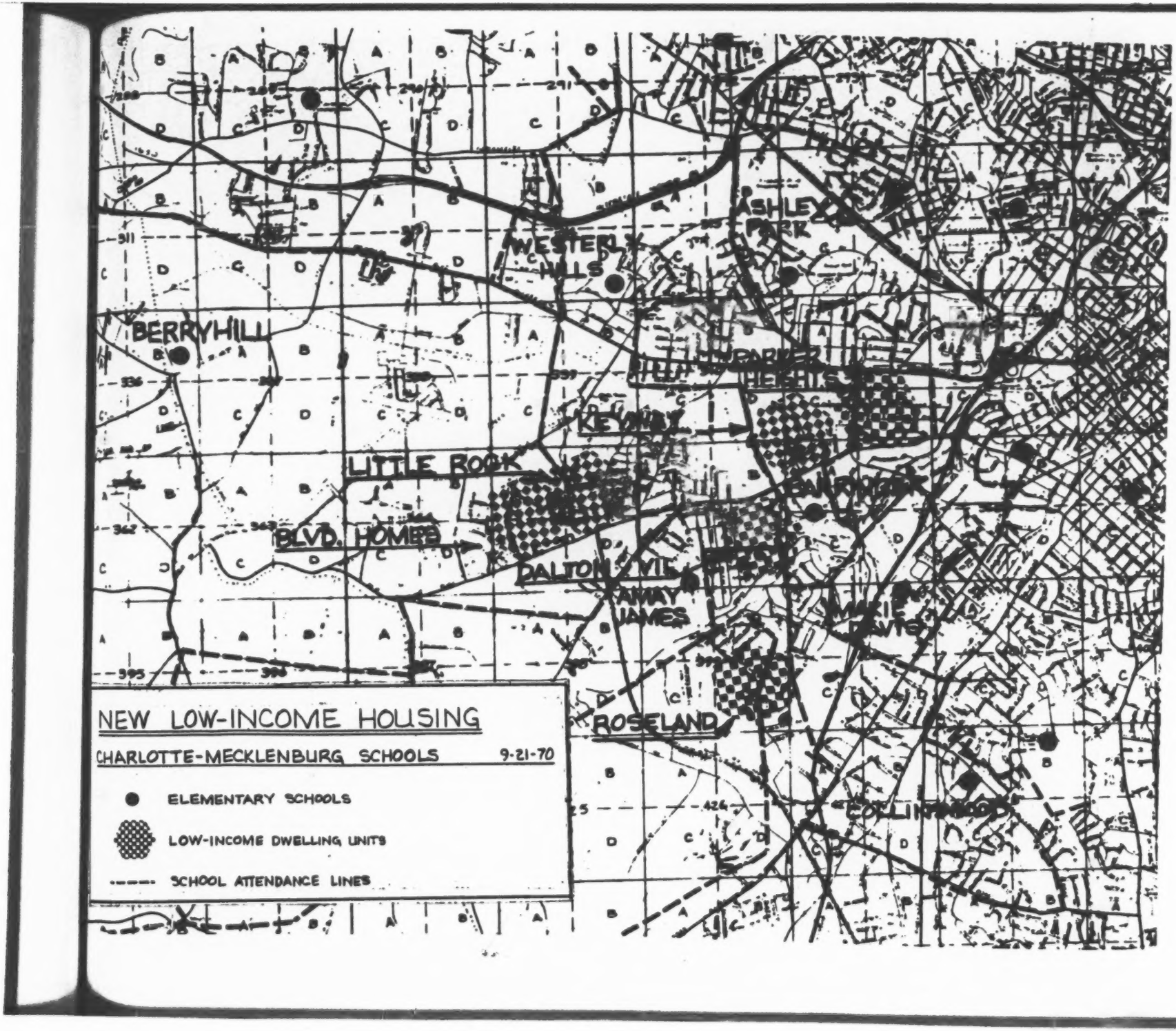
1c To relieve conditions at Barringer, send the 123 pupils from Keyway Apts:

(a) 140 pupils from Oakhurst's downtown satellite district to Bain.

(b) 123 pupils from Keyway to Oakhurst.

As a result of these moves the enrollment would be:

	W	B	T	%B
Bain	752	163	915	18
Barringer	262	173	435	40
Oakhurst	565	195	760	26


ASHLEY PARK
WESTERLY HILLS
BERRYHILL
LITTLE ROCK
BLVD. HOMES
DALTON AVE
AWAY JAMES
ROSELAND
NEW LOW-INCOME HOUSING
CHARLOTTE-MECKLENBURG SCHOOLS 9-21-70
ELEMENTARY SCHOOLS
LOW-INCOME DWELLING UNITS
SCHOOL ATTENDANCE LINES

ENROLLMENT PROBLEMS

September 22, 1970

1. The Problem:

The major enrollment problem in the secondary schools is in the Spaugh area. This problem is a result of the large number of public and private low rent housing in the western area. These projects are now distributed among the junior high school attendance areas as follows:

Quail Hollow----------Roseland

Smith----------Keyway

Wilson----------Dalton Village

Carmel----------Parker Heights

Spaugh----------Boulevard Homes and Little Rock Homes

The school in the greatest potential difficulty is Spaugh. The present racial ratio at Spaugh is 38.4% black. Little Rock Homes is not yet occupied. When this is occupied, together with other changes in the Spaugh area, Spaugh Junior High could become, before the end of this school year, a predominately black school.

2. Suggested Remedy:

a. The Independence High School satellite area is now served, primarily, by Wilson and Spaugh Junior High Schools. It would be desirable to relate this area to the junior high schools which serve Independence.

b. Northeast Junior High School, with a black ratio of 8.4% is an obvious imbalance. Elementary and senior high students are now being transported the same distance that would be necessary if a satellite area were created for Northeast.

c. It is suggested that the Wilson satellite (which serves the Independence area) in the Johnson C. Smith University area be transferred to McClintock and Albemarle Road Junior High School.

d. It is suggested that the part of the Spaugh attendance area which serves the Independence satellite be transferred to Northeast and Albemarle Road Junior High Schools.

e. It is suggested that the Little Rock Homes development be assigned to the Wilson Junior HIgh School attendance area.

The following chart shows the present data for these junior high schools and the anticipated data should these changes be adopted:

PRESENT MEMBERSHIP

School	Cap.	Anticipated Enrollment	Actual Membership 9/18/70 B	W	T	%B
McClintock	1100	1326	315	956	1271	24.7
Albemarle Rd.	1158	1134	306	749	1055	29.0
Northeast	670	612	51	552	603	8.4
Wilson	1255	854	326	586	912	35.7
Spaugh	1091	1110	440	704	1144	38.4

PROPOSED ADJUSTMENTS - Sept. 1970

School	Cap.	Anticipated Enrollment	Proposed Membership B	W	T	%B
McClintock	1100	1326	393	956	1349	29.1
Albemarle Rd.	1158	1158	350	749	1099	31.8
Northeast	670	612	129	552	681	18.9
Wilson	1255	854	248	586	834	29.7
Spaugh	1091	1110	318	704	1022	31.1

PROPOSED ADJUSTMENT - February 1971
(with full occupancy of Little Rock Homes)

School	Cap.	Anticipated Enrollment	Proposed Membership B	W	T	%B
Wilson	1255	854	333	586	919	36.2

Suggested Remedy #2

Assign the Little Rock Homes project (not now occupied) to Northeast Junior High School as a satellite. This would create a black population of approximately 19.5%. It would leave Spaugh Junior High at the 38.4 ratio. It has the advantage of not requiring any pupils to be moved at this time. It has the disadvantage of causing bussing of a greater distance than remedy #1. It does not relate junior high and senior high areas to the degree that plan #1 does. It does not offer a very permanent solution to the problem at Spaugh.

The following chart shows the effect of this plan on the schools involved:

PRESENT MEMBERSHIP

School	Cap	Anticipated Enrollment	Actual Membership 9/18/70 B	W	T	%B
Northeast	670	612	51	552	603	8.4

PROPOSED ADJUSTMENT

Northeast	670	612	136	552	688	19.8

Nos. 281, 349, 436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

JAMES E. SWANN, *et al.*,
Petitioners, Cross-Respondents,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,
Respondents, Cross-Petitioners.

BIRDIE MAE DAVIS, *et al.*,
Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*,

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

MOTION FOR LEAVE TO FILE AND PETITIONERS' REPLY TO BRIEF OF THE UNITED STATES

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL DAVIDSON
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina 28202

C. O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina 27702

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

VERNON Z. CRAWFORD
ALGERNON J. COOPER
1407 Davis Avenue
Mobile, Alabama 36603

Attorneys for Petitioners and Cross-Respondents

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

MOTION FOR LEAVE TO FILE REPLY BRIEF

Petitioners respectfully request leave to file the attached reply to the brief of the United States. This reply is being filed less than three days before the time the case will be called for hearing. See Rule 41, Rules of the Supreme Court.

The brief of the United States was filed on October 6 and received by petitioners' counsel on October 7 and 8.

Accordingly, it was not possible to complete this reply and have it printed for filing until October 10. Special arrangements are being made to serve counsel who will be arguing the case, prior to the arguments.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL DAVIDSON
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina 28202

C. O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina 27702

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

VERNON Z. CRAWFORD
ALGERNON J. COOPER
1407 Davis Avenue
Mobile, Alabama 36603

Attorneys for Petitioners and Cross-Respondents

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

PETITIONERS' REPLY TO BRIEF OF THE UNITED STATES

Several arguments advanced by the United States in its brief amicus curiae occasioned this reply.

(1) At p. 17, the Government attributes to petitioners the position that the Constitution requires "the ratio of white to black students in each school [to be] . . . as near as possible to the ratio of white to black students in the system as a whole." This is not petitioners' position. Nothing in petitioners' briefs suggests this position, which

the Government elsewhere characterizes as "racial balance" (pp. 16, 18-21, 23).

Petitioners' plan for the desegregation of the Mobile public school system in No. 436 does not depend upon a theory of "racial balance." [1] Nor does Judge McMillan's plan for the desegregation of the Charlotte-Mecklenburg public school system in Nos. 281 and 349 depend upon a theory of "racial balance." [2] "Racial balance" is a whipping-boy that respondents and the Government find it convenient to belabor. But it has nothing to do with petitioners' contentions respecting the requirements of the Constitution.

(2) Petitioners' contentions do not depend upon "ratios." They would permit 50-50 schools to exist, for example, in a 70-30 school district where residential stability and other characteristics of the school population did not threaten resegregation, and the history of the school board per-

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[1] See Brief for Petitioners in No. 436, pp. 63-79.

[2] See the Government's quotation from Judge McMillan's opinion at p. 21. After the Charlotte-Mecklenburg school board had consistently failed to produce an acceptable desegregation plan, Judge McMillan was compelled to appoint an expert to devise a plan. He was thereby obviously required to instruct the expert concerning the *ideal* objectives of the plan—something that would not have been necessary if the board had developed anything approximating a satisfactory plan of its own. In this context only, Judge McMillan resorted to ideals defined by ratios—but with the clear recognition that substantial deviations from the ratios would be permitted where other practical and educational considerations called for them. And the ultimate plan approved by Judge McMillan does not in fact involve racial ratios in each school that reflect those of the district as a whole.

Judge McMillan expressly noted that his decision does not rest on a conclusion that "racial balances" are constitutionally required. He said:

> "This court has not ruled, and does not rule, that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before the court*" (emphasis in original) (Brief Appendix, p. 12).

formance did not require more exacting demands to guard against evasions. What petitioners *do* urge is simply that this Court should announce principles for the ultimate form of school desegregation plans which meet two requirements:

First, they fulfill the promise and the constitutional holding of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), that no black child is to be assigned to a racially identifiable "black" school such as the all-black and virtually all-black schools which the Fifth Circuit has permitted to exist in Mobile and which the HEW plan would permit to exist in Charlotte-Mecklenburg.

Second, they announce this first requirement in terms that are sufficiently clear, unmistakable, and decisive so that the Court's opinion in these cases will not spawn 16 more years of litigation like the 16 years of litigation that followed *Brown*.

(3) The Government's position fails to meet either requirement. The Government urges that:

> An appropriate standard should give proper attention to a number of circumstances, such as the size of the school district, the number of schools, the relative distances between schools, the ease or hardships for the school children involved, the educational soundness of the assignment plan, and the resources of the school district. (P. 8)

If 16 years of litigation under *Brown* have demonstrated anything, it is that the enunciation of this "standard" by this Court in this year 1970 would be an unmitigated disaster. Under this standard, southern desegregation will remain an unresolved issue, and litigation of how many black children can be penned in all-black schools will still be going on, in 1986.

(4) The only justification that the Government offers for this unserviceable standard is the notion of deference to "the traditional neighborhood method of school assignment" (p. 9; see p. 24). But we are talking about desegregating schools that have never had a "traditional neighborhood method of school assignment." Time out of mind prior to *Brown*, both Mobile and Charlotte-Mecklenburg had school assignment systems that took black children out of their "neighborhoods" to black schools and white children out of their "neighborhoods" to white schools. After *Brown*, both used plans that were not "neighborhood" plans.[3] Recently, both developed "neighborhood school" schemes whose design and effect were to perpetuate segregation. If the neighborhood school system had any other "benefits" (p. 9), they had escaped local notice altogether during many years, and now continued to be subordinated to the interests of segregation for schools were located, their capacities designed, their grades structured, their zone lines drawn, and their "neighborhoods" thus shaped to achieve continued segregation of the races.

The Government admits that all of this is so as to Mobile and Charlotte-Mecklenburg (pp. 12-16), but seem to suggest that Mobile and Charlotte-Mecklenburg are aberrations. They are not aberrations. If one is to go outside these records, one will find that no school district which practiced the sort of racial discrimination condemned in *Brown* had a "traditional neighborhood" school system. They all sent blacks to black schools and whites to white schools without regard to "neighborhoods" or geographic proximity. These are the school systems that are at issue here.

But we do not think that the Court should go outside the record. If there are school districts which have truly

[3] Indeed, in No. 436, the Mobile School Board adamantly resisted the principle of neighborhood schools. See petitioners' brief in No. 436, p. 29, n. 26.

had "traditional neighborhood" school systems, they lie beyond the scope of this Court's post-*Brown* experience and doubtless differ in so many ways from Mobile and Charlotte-Mecklenburg that nothing the Court decides herein could affect them. To reason from the supposed nature and "benefits" of those systems without a record adequately describing them would be perilous enough even if such systems were in question. But the only systems in question here are those that have traditionally subordinated or shaped neighborhoods to race; and, as to them, the Government's "traditional neighborhood" school principle is manifestly hollow.

(5) The Government's reasoning from the "neighborhood" school premise is as faulty as the premise. We understand it to say that because various devices have been used by southern school boards to make the "neighborhood" school principle a serviceable tool of segregation—i.e., school location, school size manipulations, grade structure manipulation, zone line manipulation (pp. 12-16)—these same devices, but only these, may be used as "the focal point of a proper remedy . . . to disestablish the dual system and eliminate its vestiges (p. 16; see p. 25). Two things are wrong with this argument as a basis for concluding that "a system of pupil assignment on the basis of contiguous geographic (residence) zones . . . is constitutionally acceptable in desegregating urban school systems" (p. 24).

First, southern school boards—and these school boards—have used not merely manipulative practices within contiguous zones but also non-contiguous zones and busing to achieve segregation. If the measure of desegregation devices is to be determined by those devices previously used to segregate, then non-contiguous zones and busing are included.

Second, there is no doctrinal, logical or practical reason why the roster of desegregation devices should be measured by that of segregation devices. So far as we are aware, it has never been supposed that the remedial means of a court of equity were those used by a malefactor in creating the situation that requires remedying. . .

(6) It is not only, however, the Government's reasoning that troubles us, but the consequences to which it inevitably leads:

First, as we have said in paragraph (3), *supra,* the Government's vague and elastic "standards to be applied in fashioning remedies for state-imposed segregation" (p. 8) will unquestionably produce another desolating, wasteful and protracted era of school desegregation litigation. We had hoped that this Court's decision in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969); and *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970), were meant to end that sort of thing.

Second, standards of this sort cannot be fairly and uniformly administered. In practice, they boil down to the disposition of the school board, or local district judge, or the sitting panel of the court of appeals. Experience in the Fifth Circuit in the past year demonstrates the effect of standards such as the Government proposes. The Government's description of the Fifth Circuit jurisprudence at pp. 19-20, 25-26, suggests a sort of consistency that the cases entirely lack. In the Fifth Circuit, as we have shown in petitioners' brief in No. 436, the degree of desegregation ordered varies from panel to panel.

Third, in the last analysis, as the Government admits on p. 26, its "standards" amount to nothing more than a promise of judicial review of the "good faith" of school officials. Sixteen years of school desegregation litigation

since *Brown* teach the delusiveness, the utter futility of any such approach to desegregation.

(7) This Court should order that the schools be desegregated by declaring that each black child in Mobile and Charlotte-Mecklenburg must be assigned to a school which is not a racially identified "black" school. See para. (2), *supra*. Judge McMillan's order on Nos. 281 and 349 should be approved as a practicable plan found effective to achieve this result in Charlotte-Mecklenburg; and the judgment of the Court of Appeals for the Fifth Circuit in No. 436 should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL DAVIDSON
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina 28202

C. O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina 27702

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

VERNON Z. CRAWFORD
ALGERNON J. COOPER
1407 Davis Avenue
Mobile, Alabama 36603

Attorneys for Petitioners and Cross-Respondents